SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 394

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

DESIGNATION OF RECORD ON APPEAL—Filed December 7, 1953

To V. Bailey Thomas, Honorable Clerk of Said Court:

Appellant Ben G. Levy, hereafter referred to as Applicant, hereby designates the following numbered items to comprise the Record on Appeal to the United States Court of Appeals for the Fifth Circuit from the Order of this Court entered in this matter on November 24, 1953:

I

Applicant's Application for Admission to the Bar of this Court, dated June 25, 1953, with attached Exhibits consisting of Affidavit, Certificate of Enrollment issued by Clerk, Supreme Court of Texas and Letters of Recommendation;

II

Bar Committee's Recommendation and Report on above Application, dated September 28, 1953;

III

Applicant's Exceptions to above Committee's Recommendation and Report, dated November 17, 1953;

IV

Transcript of proceedings had before this Court in this matter on November 19, 1953;

[fol. 2]

V

Order of this Court entered November 24, 1953, in this matter;

VI

Notice of Appeal from the above Order filed December 3, 1953, including the Appeal Bond;

VII

This designation of Record on Appeal, filed December 7, 1953.

(S.) Ben G. Levy, Attorney at Law.

901 Scanlan Building, Houston 2, Texas, CApitol 9608.

[fol. 3] In the United States District Court for the Southern District of Texas, Holding Sessions at Houston

Ex Parte: Ben G. Levy (for Admission to Practice in U. S. District Court) Southern District of Texas.

Be it remembered: That in the above entitled cause, lately pending in said Court, an Order of Court, Approving Bar Committee's Report and Recommendation that Ben G. Levy denied Admission to the Bar of this Court was rendered at the Regular September 1953 Term of said Court to-wit:

On the 24th day of November A. D. 1953, the Honorable T. M. Kennerly, Allen B. Hannay, and Ben C. Connally, Judges of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

Application of Ben G. Levy for Admission to Practice

Office of the Clerk, United States District Court, Post Office Building, 701 San Jacinto Street, Houston 2, Texas.

Dear Sir:

In accordance with Rule 5(b) of the Local Rules of the United States District Court for the Southern District of [fol. 4] Texas, relating to the admission of attorneys, I am hereby making application for admission to the Bar of the said Federal District Court.

Attached hereto is the affidavit in duplicate, together with two letters and documentary evidence of my license in the State of Texas, all of which are required by Rule 5(b).

Trusting that these papers include all the necessary data, I am,

Very truly yours, (S.) Ben G. Levy.

BGL/ni
Encl.

The STATE OF TEXAS,
County of Harris:

Before Me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Ben G. Levy, to me well known, and who, after being by me duly sworn, did depose and say that the facts, statements, and allegations set forth below are true and correct:

"I was born April 18, 1927, in New York City, New York, the son of Lester Levy and Sadie Rebecca Levy. I presently reside at 816 Holman Street, Houston, Texas, where I have been living approximately one-and-one-half years. On November 17, 1952, I was duly enrolled as an attorney in the Supreme Court of Texas and have been licensed to practice in all the Courts of the State of Texas. Since my admission to the State Bar of Texas, I have practiced law only in Houston.

[fol. 5] "After serving in the United States Naval Service for approximately one-and-one-half years, I was given an honorable discharge on July 17, 1946. I have never been either convicted or accused of any crime in my life, either felony or misdemeanor. I hold a B. S. Degree from the College of the City of New York, and an LL.B. Degree from the South Texas College of Law."

Ben G. Levy.

Sworn To And Subscribed before me by the said Ben G. Levy, this the 25 day of June, A. D. 1953, to certify which witness my hand and seal of office. (S.) I. J. O'Connell, Notary Public in and for Harris County, Texas. (Seal.)

Card No. 7160 with Morris Bogdanow.

Paranthetical insertion written by Chairman of Bar Committee, M. S. McCorquodale, after submission by Applicant.

B. G. Levy.

Law Offices Of
Andrew M. Smith,
1st National Bank Building,
Houston, Texas

June 26, 1953.

Presiding Judge,
United States District Court,
Houston, Texas.

Dear Sir:

Mr. Ben G. Levy has advised me that he is an applicant for admission to practice before the Federal Courts of this [fol. 6] District. I have known Mr. Levy for approximately a year, have observed his conduct professionally and otherwise. I believe that he is qualified in every respect for admission to practice before the Courts to which he has applied for admission. I do not hesitate to recommend him.

Very truly yours, (S.) Andrew M. Smith.

AMS/bg

Herbert Finkelstein,
Attorney at Law,
305 Houston Bank & Trust Bldg.,
Houston, Texas

June 22, 1953.

Presiding Judge,
United States District Court,
Houston, Texas.

Dear Sir:

I am pleased to recommend Mr. Ben G. Levy for admission to the federal bar. I have known Mr. Levy for about one year and in my opinion he is competent to practice in the United States District Courts. I believe that he possesses all the qualifications required for admission to the bar of the United States District Court for the Southern District of Texas. I have examined Mr. Levy's personal

statement and affirm that his private and professional character and standing are good.

Respectfully yours,

(S.) Herbert Finkelstein.

hf/e

[fol. 7] 1952 1952

Supreme Court of Texas

This is to certify that Ben G. Levy is duly enrolled as an attorney in the Supreme Court of Texas. That he has complied with the provisions of the State Bar Act and is a member of the State Bar in good standing.

Given under my hand and seal of the Supreme Court of Texas, this the 17th day of November, 1952.

(S.) Geo. H. Templin, Clerk, Supreme Court of Texas.
#10945

(Copy of Card Certificate issued by Clerk, Supreme Court of Texas.)

Signature of Member: Ben G. Levy, Of Houston, Texas.

In United States District Court

Report of Bar Committee to Judges—Sept. 28, 1953

Re: Application of Ben G. Levy for Admission to the Bar
To the Honorable District Court:

The above applicant has not satisfied the Committee that he is entitled to admission, and your Committee recommends [fol. 8] against a license in this instance.

He is associated with Morris Bogdanow, who is generally considered to be a member of the Communist Part-. At least, he is referred to as a communist openingly and in publications.

In previous cases, we have had valuable as-istance from the F. B. I. in getting some idea about whether applicants are communists. In the case of Mr. Bogdanow, assistance was declined. Expressing purely an opinion, we are inclined to believe that there was no lack of willingness to

cooperate, but rather that the information is such as the Agent-In-Charge did not care to reveal it.

The applicant denied being a communist. Asked whether his employer, Mr. Bogdanow, was a communist, the applicant replied: "I don't know."

The applicant was born and reared in New York and came to Houston only a few years ago.

We are not sure we can believe his statement that he does not know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers.

We have not been favorably impressed with this applicant, although our acquaintance is confined to a hearing given to him.

Your Committee has never been given suggestions by the Court, either generally or specifically. We wish the Court to know that in any case in which the Court might like to have a record, we will be glad to take testimony of the applicant, or available witnesses, as authorized by the present rule under which we operate.

This applicant has made insistent inquiries of the Committee, but, as usual, we declined to give him any information, stating that we did not feel at liberty to discuss any action with an applicant. We have felt that it is for the [fol. 9] Court to make any disclosure to the applicants, if any disclosure is to be made. We anticipate the Court will receive some inquiry from this applicant.

Mr. Levy's application was held under consideration some what longer than usual because it came up during the summer, and, due to absence from the city of members of your community, on vacation during the latter part of August, we have been unable to convene a full Committee until recently. We never recommend against an application without consideration of all members of the Committee.

Respectfully, For the Committee,

(S.) M. S. McCorquodale, Chairman.

MSM:F

In United States District Court

Applicants Exceptions to the Bar Committee's Report—Filed November 17, 1953

To The Hon. T. Kennerly, Han. Allen B. Hannay, and Hon. Ben C. Connally, Judges of Said Court:

Now Comes, the above Applicant and respectfully shows to the Court that in the several respects hereinafter mentioned, the Committee on Admissions has erred to the prej-[fol. 10]udice of this Application in its report and conclusions, to-wit:

I

For the Committee to decide competently that an applicant is not entitled to admission, it is submitted that the whole Committee should be present at the hearing which so determines his eligibility. In this instance, only one Committee member conducted the hearing. The other Committee members did not at any time, before or after the Committee recommended that this Applicant be denied admission, confront, interrogate, or in any way examine him.

II

The rationale behind the Committee's adverse recommendation, it seems fair to state, in the Applicant's "association" with Morris Bogdanow, who, according to the Committee report, ". . . is generally considere- to be a member of the communist party. At least, he is referred to as a communist openingly (sic) and in publications." Lack of any explicit definition of "association" respecting ascertainable criteria as to its scope, degree, or purpose, augments the flagrantly hearsay testimony in this report in an effort to deprive this applicant of present, and possibly all future, opportunity to practice before the Federal Courts. It is submitted that this procedure is in direct and irreconcilable contradiction to the traditional concept of "due process" as expressed in the Fifth and Fourteenth Amendments to the United States Constitution.

[fol. 11] Immediately preceding the Committee's conclusion that it is "not favorably impressed with this appli-

cant," and inferentially causing such appraisal, are the following three quoted statements:

(a) "The applicant denied being a communist. Asked whether his employer, Mr. Bogdanow, was a communist, the applicant replied: 'I don't know.'" Express denial of this reply is hereby made. Applicant recalls without any doubt that his reply to such question was, "Not as far as I know." Such reply is still wholly applicable and honest at this time.

(b) "The applicant was born and raised in New York and came to Houston only a few years ago." This is quite true, and incontestable. Applicant was totally unable at the time to select the location of his birth. It is submitted as obvious that such an intimation of unreasonable prejudice, however attenuated, adversely affected the Committee's determination of this Applicant's application for admission to practice before this Court.

(c) "We are not sure we can believe his statement that he does not know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers."

It seems appropriate to indicate here that to be acquainted with one's "communistic" (or, perhaps more accurately, unorthodox) views is not identical to knowing that the individual is a member of the Communist Party. An alleged newspaper accusation that one is a "Communist" is rarely [fol. 12] in accordance with, or the result of, the "due process" requirements of fair play, adequate hearing, and an impartial decision. The "due process" clause requires at least that every man shall have his day in Court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the general rules which govern society.

IV

Applicant asserts that the Committee procedure in this instance was highly arbitrary and capricious, motivated by prejudice and reliance on wholly inadmissible evidence,

that the adverse recommendation should be disregarded, and he should be admitted to practice before this United States District Court.

Wherefore, Applicant, Ben G. Levy respectfully prays that all and singular his objections to the report of the Committee on Admissions be sustained by this Court, and that the special findings to which this Applicant has objected be, to the extent deemed by this Court right and proper, set aside and disapproved, and that this Court will by further order admit to practice said Applicant before the United States District Court for the Southern District of Texas.

Dated November 17, 1953.

Respectfully submitted,

(S.) Ben G. Levy, Attorney at Law.

901 Scanlan Building, Houston 2, Texas.
[fol. 13] CA-9608.

Applicant requests, if it please the Court, that his Hearing be held in Chambers.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In The Matter of Application of Ben G. Levy for Admission to The Bar of This Court

Transcript of Proceedings

Judge Kennerly:

The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953, from that Committee.

I am informed, Mr. Levy, that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.

As I understood the rules, Mr. Levy had two courses open to him. On was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be

taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to the report, and we are here to hear you now, Mr. Levy, on your exceptions. Do you still want to pursue that course?

[fol. 14] Mr. Levy: Yes, Your Honor.

Judge Kennerly:

All right. You may proceed.

STATEMENT OF MR. LEVY

Mr. Levy: Thank you. I should like to express my appreciation for the opportunity to appear before Your Honor.

The question of whether I should risk my professional reputation in defense of what I believe to be a principle is indeed a moral question, but it is also a political one. I believe no resource is of greater value than the American tradition of freedom and due process. But to create an awareness that this tradition is in danger, and I believe it is, the Representative Man, in Emerson's phrase, must speak out. Principles do not defend themselves. They must ultimately be defended by people. I believe a time of testing is at hand, and those devoted to the Bill of Rights must ask themselves: "When, if not now?" and "Who, if not I?"

I don't believe anything could be more pertinent, in arguing against the recommendation of the Committee, than stating my biography and my political views.

First of all, I should like to state now that I am not and never have been a member of the Communist Party. I don't believe in using force and violence to overthrow the Government, or to effect social changes, and so I could never conceivably be such, a member of the Communist Party. My creed is what I conceive to be the American Creed. I believe in freedom of religion and freedom of the [fol. 15] press and freedom of thought and fre-dom of criticism and freedom of movement, and in freedom of association. I believe it is the right and duty of every citizen to work for and to expect and to obtain an increasing measure of political and economic and emotional security for all.

I am opposed to oppressive discrimination in any form. I am opposed to the arbitrary and unwarranted use of

power and authority, from whatever source, and against any individual or group. I believe in Government by law, not my men, and that the law is above any man, and not any man above the law.

I believe these principles are sacred. I regard them as the basic fabric of American life, and I believe in them as living realities, not just as words on paper.

That is my creed. Those are the principles that guide me. Together, those are the principles that I have been prepared in the past to fight for, and am prepared at any time to defend, with my life if necessary.

I served in the Second World War. I joined voluntarily when I was 17, and after the war was over I was discharged. I was given an honorable discharge.

It is true, as Mr. McCorquodale has pointed out in his report, that I was born and raised in New York City. I received my education at the College of the City of New York, got my Bachelor of Science degree there. I had to work for my education. I worked during the summers; I worked part-time towards the goal of becoming an attorney. [fol. 16] I came to Texas only for climatic and economic reasons, the beckoning of warmer weather and what I felt to be greater economic opportunity. I got my law degree from the South Texas School of Law. I had to work in order to make my way through. I also went under the G. I. Bill of Rights. I took my Texas State Bar exam in October of 1952. I quit my job where I was working at Foley's about a month or so in advance to study for the Bar exam.

I was looking for a job for several months. I applied at all the large law firms that I know of, and several small ones and individual practitioners. Including Fulbright, Crooker. I applied for a job at several oil companies, and several insurance companies.

I never asked any prospective employer what his political or religious beliefs were. I didn't consider it in my province to questi-n any employer as to what his political or religious beliefs are. I would consider it, if I were an employer, highly presumptuous of anyone coming to me for a job to ask me what I think about certain issues.

My bank account at the time had reached a low two figure mark, and was rapidly approaching extinction. Out of

desperation, I took a job in an office on the north side in Houston here, in partnership with someone who was then in the Federal Government, and wanted me to—well, I felt more or less like a watchman there. In the two and half months that I was working in this office, I made a total of approximately, a gross of approximately 48 dollars. And, as I say, my financial situation was getting desperate.

[fol. 17] I heard, via the grapevine, that among others Mr. Bogdanow had a position open. I went to apply to Mr. Bogdanow, and to the others. I didn't ask him his political beliefs, what his political beliefs were; I didn't ask him what his religious beliefs were. I was looking for a job. He offered me a position at 25 dollars a week, which isn't sumptuous, but it is better than what I had, and it kept me from starving. I took that job, and I was grateful to him for offering it to me.

I don't think I have to point out that I am not permanently obligated to Mr. Bogdanow. I am not married to him. If any of the members of the Committee were to offer me a better job, I would take it without asking them what their political or religious beliefs were. I dare say that no young attorney looking for a position would be so presumptuous as to ask any prospective employer what his beliefs were.

If the Court please, I should like to make reference to my notes.

I would classify my own political views as liberal, for which I make no apologies. I happen to be, as perhaps distinguished from the Chairman of the Committee, an admirer of Franklin Roosevelt. I voted for Harry Truman, and for Adlai Stevenson in the last campaign. I believe that liberalism is, to use the memerable words of Justice Holmes: "The belief in the free trade of ideas, that the test of truth is the power of thought to get itself accepted in the competition of the market place."

Liberalism, as I believe, conceives of life, not in terms of bare survival or peace at any price, but in the light of ideals [fol. 18] upon which he is prepared to stake everything. Among these ideals are the strategic freedoms of the liberal American tradition, which make the continued use of intelligence possible. I believe that liberalism must defend

the free market in ideas against those spokesmen of the status quo who would freeze the existing inequalities of opportunity and economic power by choking off the criticism. By labeling all progressive ideas as Communistic, these spokesmen help the Communist strategy. If this reactionary movement gains momentum, it will petrify the status quo and destroy the possibilities of peaceful, social change.

Now, in my capacity of employee of Mr. Bogdanow, I have had to represent men in the Corporation Court for traffic tickets; I have had to file petitions in the District Court; I have had to do any number of routine jobs. Mr. Bogdanow never asked me to join in a conspiracy to transmit information to the Soviet Union. He never asked me to bomb any Government buildings. I did nothing but routine tasks, and that was the only scope of our association. If I am offered a better job, I have no ties with Mr. Bogdanow. I have had political discussions with him. Surely his views are unorthodox; I am aware of that. His views are not Communistic. I have heard him criticize not only the American Government in certain policies, I have heard him criticize the Soviet Government as much as anyone else has criticized the Soviet Government. I understood that he had represented Communists before this Court, and I have a high personal regard for him for so doing, because in these days of a lot of the lawyers are too afraid to risk their personal and professional reputation to do so, and I thank God we have men in this country today in our profession that have the courage to so represent these people. I [fol. 19] believe that the Canon of Ethics, which states that a man, any man is entitled to representation, means what it says. A man who represents a murderer or a rapist does not thereby approve or condone the murder or rape. But he does believe that any man is entitled to representation, as the Canon of Ethics, as I was taught them in law school, preaches.

If the Court please, I should like to read a quotation from Judge Learned Hand that was published by the Emergency Civil Liberties Committee, from a speech which he delivered before the University of the State of New York on October 24, 1952. It is a rather short excerpt, but I think it ex-

presses in words far more eloquent than I could utter exactly what I believe.

It doesn't so please the Court?

Judge Kennerly: Go ahead.

Mr. Levy: It reads as follows:

"Our nation is embarked upon a venture, as yet unproven; we have set out hopes upon a community in which men shall be given unchecked control of their own lives. That community is in peril; it is invaded from within, it is threatened from without, it faces a test which it may fail to pass. The choice is ours whether, when we hear the pipes of Pan, we shall stampede like a frightened flock, forgetting all those professions on which we have claimed to rest our polity. God knows, there is risk in refusing to act till the facts are all in; but is there not greater risk in [fol. 20] abandoning the conditions of all rational inquiring? Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion, and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and a grave reliance upon free discussion. I do not say that these will suffice; who knows but we may be on a slope which leads down to aboriginal savagery. But of this I am sure: If we are to escape, we must not yield a foot upon demanding a fair field, and an honest race, to all ideas.

'Blame not before thou hast examined; understand first and then rebuke. Answer not before thou hast heard; interrupt not in the midst of speech.' Those words were written nearly 2000 years ago; they came out of an experience already long, and refined in the fires of passion and conflict; they are the product of a wisdom, bought by ages of bitter trial; and by that wisdom alone shall we be saved, we, who [fol. 21] boast ourselves to be the apostiles of a faith in the eventual triumph of Wisdom."

I believe that the Committee, as represent*at*ed by Mr. McCorquodale, has not shown any evidence that it can distinguish between social reform and Communism, between heresay and a conspiracy. I believe that not only for myself, but I believe I am representing what I consider to be an important principle here, of variation from the orthodox point of view. I don't believe my views, my opini-ns are orthodox, but that does not make me ipso facto, and I am not, a Communist.

If the Court please, I have just one more quotation to read, from Justice Douglas of the Supreme Court. This article is also published by the Emergency Civil Liberties Committee, and entitled "The Black Silence of Fear." Justice Douglas says as follows:

"There is an ominous trend in this nation. We are developing tolerance only for the orthodox point of view on world aff*ia*rs, intolerance for new or different approaches. Orthodoxy normally has sto-d in the path of change. Orthodoxy was always the stronghold of the status quo, the enemy of new ideas—at least new ideas that were disturbing. He who was wedded to the orthodox view was isolated from the challenge of new facts.

"The democratic way of life rejects standardized thought. It rejects orthodoxy. It wants the fullest and freest discussion, within peaceful limits, of all public issues. It encourages constant search for truth at the periphery of knowledge.

[fol. 22] "We as a people have probably never lived up to that standard in any of our communities. But it has been an ideal toward which most of our communities have strived. We have over the years swung from tolerance to intolerance and back again. There have been eras of in-

tolerance when the views of minorities have been suppressed. But there probably has not been a period of greater intolerance than we witness today.

"To understand this, I think one has to leave the country, go into the back regions of the world, lose himself there, and become absorbed in the problems of peoples of different civilizations. When he returns to America after a few months he probably will be shocked. He will be shocked not at the intentions or purposes or ideals of the American people. He will be shocked at the arrogance and intolerance of great segments of the American press, at the arrogance and intolerance of many leaders in public office, at the arrogance and intolerance reflected in many of our attitudes toward Asia. He will find that thought is being standardized, that the permissible area for calm discussion is being narrowed, that the range of ideas is being limited, that many minds are closed to the receipt of any ideas from Asia.

"This is alarming to one who loves his country. It means that the philosophy of strength through free speech is being forsaken for the philosophy of fear through repression.

. . .

"Fear has many manifestations. The Communist threat inside the country has been magnified and exalted far beyond its realities. Irresponsible talk by irresponsible people has fanned the flames of fear. Accusations have been [fol. 23] loosely made. Character assassinations have become common. Suspicion has taken the place of good-will. Once we could debate with impunity along a wide range of inquiry. Once we could safely explore to the edges of a problem, challenge orthodoxy without qualms, and run the gamut of ideas in search of solutions to perplexing problems. Once we had confidence in each other. Now there is suspicion. Innocent acts become telltale marks of disloyalty. The coincidence that an idea parallels Soviet Russia's policy for a moment of time settles an aura of suspicion around a person.

"Suspicion grows until only the orthodox idea is the safe one. Suspicion grows until only the person who loudly proclaims that orthodox view, or who, once having been a Communist, has been converted, is trustworthy. Competition for embracing the new orthodoxy increases. Those

who are unorthodox are suspect. Everyone who does not follow the military policymakers is suspect. Everyone who voices opposition to the trend away from diplomacy and away from political tactica takes a chance. Some who are opposed are indeed 'subversive.' Therefore, the thundering edict commands that all who are opposed are 'subversive.' Fear is fanned to a fury. Good and honest men are pilloried. Character is assassinated. Fear runs rampant.

"Fear even strikes at lawyers and the bar. Those accused of illegal Communist activity—all presumed innocent, of course, until found guilty—have difficulty getting reputable lawyers to defend them. Lawyers have talked with me about it. Many are worried. Some could not volunteer their services, for if they did they would lose clients and their firms would suffer. Others could not volunteer [fol. 24] because if they did they would be dubbed 'subversive' by their community and put in the same category as those they would defend. This is a dark tragedy.

"Fear has driven more and more men and women in all walks of life either to silence or to the folds of the orthodox. Fear has mounted—fear of losing one's job, fear of being investigated, fear of being pilloried. This fear has stereotyped our thinking, narrowed the range of free public discussion, and driven many thoughtful people to despair. This fear has even entered universities, great citadels of our spiritual strength, and corrupted them. We have the spectacle of university officials lending themselves to one of the worst witch hunts we have seen since early days.

"This fear has affected the youngsters. Youth has played a very important role in our national affairs. It has usually been the oncoming generation—full of enthusiasm, full of idealism, full of energy—that has challenged its elders and the status quo. It is from this young group that the country has received much of its moral power. They have always been prone to question the stewardship of their fathers, to doubt the wisdom of traditional practices, to explode cliches, to quarrel with the management of public affairs.

"Youth—like the opposition party in a parliamentary system—has served a powerful role. It has cast doubts on our policies, challenged our inarticulate major premises, put the

light on our prejudices, and exposed our inconsistences. Youth has made each generation indulge in self-examination. [fol. 25] "But a great change has taken place. Youth is still rebellious; but it is largely holding its tongue. There is the fear of being labeled a 'subversive' if one departs from the orthodox party line. That charge—if leveled against a young man or young woman—may have profound effects. It may ruin a youngster's business or professional career. No one wants a Communist in his organization nor anyone who is suspect.

"And so the lips of the younger generation have become more and more sealed. Repression of ideas has taken the place of debate. There may not be a swelling crowd of converts to the orthodox, military view. But the voice of the opposition is more and more stilled, and youth, the mainstay in early days of the revolt against orthodoxy, is largely immobilized.

"This pattern of orthodoxy that is shaping our thinking has dangerous implications. No one man, no one group can have the answer to the many perplexing problems that today confront the management of world affairs. The scene is a troubled and complicated one. The problems require the pooling of many ideas, the exposure of different points of view, the hammering out in public discussions of the pros and cons of this policy or of that. . . .

"The great danger of this period is not inflation, nor the national debt nor atomic warfare. The great, the critical danger is that we will so limit or narrow the range of permissible discussion and permissible thought that we will become victims of the orthodox school. If we do, we will lose flexibility. We will lose the capacity for expert management. We will then become wedded to a few techniques, to a few devices. They will define our policy and at the same [fol. 26] time our ability to alter or modify it. Once we narrow the range of thought or discussion, we will become like the man on the toboggan who can ride it but who can neither steer it nor stop it.

"The mind of man must always be free. The strong society is one that sanctions and encourages freedom of thought and expression. When there is that freedom, a nation has resiliency and adaptability. When freedom of ex-

pression is supreme, a nation will keep its balance and stability.

"Our real power is our spiritual strength, and that spiritual strength stems from our civil liberties. If we are true to our traditions, if we are tolerant of a whole market place of ideas, we will always be strong. Our weakness grows when we become intolerant of opposing ideas, depart from our standards of civil liberties and borrow the policeman's philosophy from the enemy we detest.

"That has been the direction of our drift. It is dangerous to the morale of our people; it is destructive of the influence and prestige of our country. We have lost much of our resiliency, much of our inventive genius. The demands of orthodoxy already have begun to sap our strength —and to deprive us of power. One sees it from far-off Asia. From Asia one sees an America that is losing its humanity, its idealism, and its Christian character. From Asia one sees an America that is strong and rich and powerful, and yet crippled and ineffective because of its limited vision.

"When we view this problem full face we are following the American tradition. The times demand a renaissance in [fol. 27] freedom of thought and freedom of expression, a renaissance that will end the orthodoxy that threatens to devitalize us."

Your Honors, I am hereby waiving all immunities in requesting that I be placed under oath to answer any relevant questions that deal with my political views or my past or present record.

Judge Kennerly: I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.

Mr. Levy: Yes, Your Honor.

Judge Kennerly: But we, of course, are glad to have your statement and your views about these matters.

Mr. Levy: I would like to add one more thing, Your Honor:

As I stated in my exceptions to the Committee report, the only hearing I had before the Committee was before

Mr. McCorquodale as the Chairman of that Committee. I don't believe that the Committee can properly stigmatize an applicant without sitting as a group to question him, to investigate any matters it wishes to. I don't believe one man on that Committee should have that power, and neither [fol. 28] before nor after the Committee recommended against my application did the other members of the Committee question me, at no time, despite my offer to volunteer to come before the Committee.

I believe I have completed my argument, Your Honor.

Judge Kennerly: All right.

TESTIMONY OF MR. LEVY

Questions by Judge Hannay:

Q. Mr. Levy—is that the correct pronunciation?

A. Yes, sir.

Q. What fraternal, religious or political groups are you a member of at this time, or have you been in the past?

A. I go to—I happen to be Jewish, and I go to Temple Emanu El, and I also go to a Unitarian Church here in town.

Q. Are you a member of either of them, or just an attendant?

A. Well, I have offered to—I don't think—I am not a member of either. I have recently, and in no respects connected with this matter, I am a member of the Emerson Club of the Unitarian Church, and I have recently pledged to devote a portion of my monthly income to the support of the Church. I believe that may possibly make me a member.

Q. Which church

A. The Unitarian Church. However, I also go to the Temple Emanu El.

Q. I see. And what about the political? You quoted from some Civil Rights literature; do you have some membership in some Civil Rights group?

[fol. 29] A. No, sir. But I have attended some meetings of the Young Democrats of Harris County, and I did work for Adlai Stevenson in the last campaign, at the Stevenson headquarters.

Q. Those are the only organizations that you are a member of, or have been, that you recall?

A. Well, I belong also to—I am not sure it is relevant, that you may want this much, but I also belong to the Young Adult Professional Club at the Y here in town, and also to an Adult group of the Jewish Community Center.

Q. Is that all?

A. Yes, sir.

Q. What Magazines or publications do you subscribe to or regularly read, or have you subscribed to for awhile previously?

A. I read the Nation magazine, as well as Time, Life and Look. But I do consider my political views to be more similar to those expressed in the Nation than in any of the Luce publications.

Q. Were you living in New York during the trial of the so-called "Eleven Communists" or were you in the service at that time?

A. I was in the service during the Second World War, but I was—I don't recall whether or not—I left New York in 1948, I believe, and came back there during the summers to visit my family. I believe I may have been in New York during some part of the Communist trial. I never had occasion, however, to witness it.

Q. You didn't attend or have any connection with it?

A. No, sir.

Q. Politically?

[fol. 30] A. No, sir. I did, however, want to see the trial, but I never had occasion to see it.

Q. Did you have any connection with the recent Rosenberg trial, writing letters or anything along that line?

A. Yes, sir, I wrote a letter to President Eisenhower. I expressed my view, and I still believe I am correct, that the death penalty was unprecedented an- unjustified, and he should exercise clemency in commuting their sentence.

Judge Hannay: I believe that is all I care to ask.

Questions by Judge Connally:

Q. You have referred a couple of times to the Emergency Civil Rights Committee. What is that, Mr. Levy?

A. As far as I know, Your Honor, it is a group that is probably connected with the Civil Liberties Union, of which Roger Baldwin used to be Chairman. The present Chair-

man of this Committee is Paul Lehmann, who is a professor of applied Christianity at Princeton Theological Seminary.

Q. Are you affiliated with that Organization in any way?

A. No, sir, other than—I have no affiliation, just that I am interested in their publications.

Q. You volunteered awhile ago that you had supported, whom you had supported in the last presidential election. Whom did you vote for in '48?

A. I wasn't able to vote in '48. However, if I were—well, yes, I was. I voted for Truman.

Q. You told us, or rather you seemed to support these statements that you read to us from quotations from Mr. [fol. 31] Justice Douglas and Judge Hand. In Judge Douglas' article, there were repeated references to the right to think being hampered. I wonder if you would care to expand a little bit as to just what your thinking is along that line. In what particulars is liberal thinking being hampered or hindered? In what instances are liberal thinkers not being permitted to express themselves? Can you give me an illustration or go a little further as to just what you refer to as these great dangers facing us at the present, what you had in mind?

A. Yes, Your Honor. I had in mind—well, I think perhaps the best illustration of it is what is happening right now to me. Because I happen to be associated with a man who, according to the newspapers, allegedly may have been —I don't know whether he has been; I assume he may have been—has been called a Communist, anyone who associates with him, perhaps anyone who belongs to the same musical society he belongs to, is suspect, is afraid to open his mouth and speak out against the prevailing point of view, is afraid of being labeled subversive or disloyal by uttering any points of view that are critical of current specific American policies. That is what I meant, that there is a fear of being labeled, of being stigmatized; and I have that fear at the present time.

Q. Has your right to speak freely in any wise been infringed here today? Were you deprived of telling us anything you wanted to about this matter?

A. No, sir. I did not intent, Your Honor, to imply that my right to speak is being limited by legal means at all.

I mean my right, or rather—yes, I believe my right to speak is being hampered by the fear of being stigmatized in the press for upholding or adhering to an unpopular viewpoint. [fol. 32] The fear of associating with someone, in whatever capacity for whatever purpose, with someone who already has been subject to some rumor or gossip in the community for his unpopular points of view. In that sense, I believe the right of free and unhampered discussion is being restricted.

Q. You started off by telling us in general that you believe in the Bill of Rights and in the American Creed, and you were opposed to all evil, and then you told us later that you entertained views that generally were somewhat unorthodox, if I understood you. Where are your views unorthodox, or what is it about your beliefs that you characterize them as unorthodox?

A. I believe my characterization of my views as unorthodox would have special reference to this community. I believe, for example——

Q. Houston?

A. Yes, sir.

Q. What's unorthodox about Houston?

A. Well, I believe that negroes and Latin-Americans and members of all minority groups should not be segregated from other groups. I believe that these people have a right to equality of opportunity and employment. I believe that even Communists, no matter how much we despise their point of view, should have a right to say what they can, what they do, just as long as there is freedom for reason, for another point of view to combat what the Communists say. I believe that is the test of a true liberal, and I believe further that there is a substantial difference between what you might call a heretic as regards the orthodox political point of view and a conspirator who wants to overthrow the freedom of discussion and freedom of ideas that presently exists in this country.

[fol. 33] Furthermore, my views are somewhat unorthodox in that, as I say, I believed in the New Deal as Franklin Roosevelt expressed it.

Q. A lot of people have felt that way. I wouldn't call that unorthodox.

A. Well, Your Honor, apparently the prevailig opinion down here is conservative Republican, in that respect. I believe that——

Questions by Judge Hannay:

Q. If I recall right, you carried the state all four times you ran, didn't you?

A. Well, Your Honor, at the present time I believe the state went, and the Houston community, went over-whelmingly Republican, did it not?

Judge Hannay: Well, some precincts went overwhelmingly for Eisenhower. But go ahead, we won't argue about that. Go ahead, Judge. Excuse me.

Judge Connally: That's all right.

Questions by Judge Connally:

Q. I have one more thing I would like to ask you, Mr. Levy, as a lawyer. You told us that in your letter to the President, you thought you expressed the view that the death penalty in the Rosenberg case was far disproportionate to the offense, or something of that sort. Does that fairly accurately state your view on it?

A. Yes, sir, that does.

Q. Are you fundamentally opposed to capital punishment as such, or do you believe it has a place in our legal [fol. 34] order, but it just wasn't appropriate in that case?

A. Well, Your Honor, I believe I am, in point No. 1, opposed to capital punishment. In the first place, I believe that the criminal procedure as it presently exists, does not make sufficient allowance for the rehabilitation of prisoners. I don't believe that there is a sufficient effort made towards the re-education of a man who has been convicted of a crime, to socially re-orient him into constructive channels.

But in addition to that, I believe in that case it was especially inappropriate, for the following reasons—and I am painfully aware that my views on this subject are probably identical with the majority of Communists; nevertheless, it is not because it is the Communist point of view that I am upholding it, it is because it is mine:

I believe that the sentence was unprecedented for the first

reason that, as Justice Black pointed out, the Supreme Court never once had a chance to review the record in that case, never once had a chance to affirm the fairness of the trial. The record was never reviewed by the Supreme Court.

No. 2——

Q. Let me interrupt you just a moment. Do you feel that in every case in which the death sentence is imposed, we ought to change our system so that the Supreme Court must review the record? You know, of course, that it is rather seldom that they do.

A. Your Honor, I believe that when a human life is at stake, the Supreme Court should review the record to decide upon the fairness of the trial. I think it should be a mandatory procedure.

[fol. 35] Q. That is a rather drastic change you advocate in our present system, isn't it?

A. I suppose it is, Your Honor. But I believe that a human being should, before his life is taken away from him, he should be entitled to all the protections that the law could possibly give him.

Q. All right. Go on; tell me your other—from where I interrupted you.

A. Well——

Q. You were telling me that there were ce-tain circumstances about that trial where you thought the death sentence was particularly inappropriate. One was that the Supreme Court had never reviewed the record.

A. Yes, sir.

Q. Anything else?

A. Yes, sir. Your Honor, I would like to point out again that I am very cognizant that the views I am going to express are extremely unpopular, and may be subject to gross misinterpretation if they are reported in the newspapers. If it please the Court, I don't know if I am within my rights, but I should like to ask that representatives of the newspapers be directed, if not excluded, at least be directed not to report the following testimony.

Q. But, of course, this isn't testimony, you——

A. Or rather the following argument.

Q. You more or less invited questions, and you are not under oath. You are not telling us any facts about this matter; you are simply making a statement, as a member of the

Bar, or rather as an applicant for membership in the Bar here, and I thought your ideas and feelings and all were relevant to the matter here. Wouldn't you say so?

A. I think so.

[fol. 36] Q. I am inclined to think that it is an open hearing, Counsel and that if you don't care to pursue that line of questioning, I will be glad to abandon it.

A. Well, Your Honor, if you consider it relevant, I am willing to discuss them, but I do not wish to risk having my reputation damaged by any——

Q. Let me ask you just one more question. You have told us that in this Rosenberg case you wrote this letter for two reasons, if I understand you, first, because you are opposed to capital punishment, and in the second place, in that the Supreme Court had never examined the record. Have you ever written any similar letters about any other capital cases, suggesting clemency to the Governor of the state or to the President?

A. I did many years ago, Your Honor, when—I think it was before I even got into law school, when I heard about several negroes being sentenced to death in some southern state.

Q. The Scottsboro case, I suspect?

A. I don't recall the exact case. I think it may have been, but I think it might have been later than that. I don't recall exactly what case it was.

Q. I see. Are those the only two instances of that nature that you recall?

A. Yes, sir, I believe so.

Q. In writing the letter in the Rosenberg case, did you do so on your own initiative, or was it suggested to you by someone else, Mr. Levy?

A. No, sir, it was on my own initiative, because I—in the first place that, to be perfectly honest about it, Your Honor, the fact that they continued to maintain that they were innocent until the very minute before they were to be electrocuted, despite the fact that the government offered to save [fol. 37] their lives if they would admit their guilt, raised a doubt in mind as to whether or not they were in fact guilty.

Q. I see. Did you read the record in that case?

A. No, sir. I did, however, read extracts from the trial.

Q. That convinced you that there was serious question about their guilt or innocence?

A. It convinced me, one, that the Judge——

Judge Hannay: Judge Kaufman?

Mr. Levy: Yes, sir.—may possibly have been prejudiced in that case.

Q. I see. What is it that lead you to believe he was prejudiced against them, if you recall?

A. The remark, Your Honor, that comes to mind immediately, that he believes that they are responsible for, at least in large part, for the Korean war and the subsequent death of thousands of American soldiers. Anyone who believed that during the trial was bound to be prejudiced against the defendants.

Judge Kennerly: Will you repeat that? I didn't catch that.

Mr. Levy: If I remember correctly, Judge Kaufman said, was reported to have said that he believed the Rosenbergs were responsible, in large measure, for the Korean war and the death of thousands of American boys.

[fol. 38] Judge Hannay: But that was afterward. That was after the verdict of the jury, and it was also after he had spent many, many hours in the synagogue on his knees, asking divine guidance. Do you believe in Divine guidance?

Mr. Levy: I do, sir, in times of stress and doubt.

By Judge Connally:

Q. Are you familiar with the trial Judge Medina held up there in New York some five years ago?

A. Yes.

Q. Did you keep up with that very carefully?

A. Not very carefully, Your Honor. I am somewhat familiar with it.

Q. Do you entertain the thought that he was perhaps in any wise prejudiced against those people that were on trial there?

A. Your Honor, if he were prejudiced, he may have been provoked by the action of the Counsel. I am not—I don't remember reading any evidence to indicate that he was unduly prejudiced against them.

Q. You think they got a fair trial, then, eh?

A. I believe—as far as I know, Your Honor, and as far as any Communist can get a fair trial today, I believe they did get a fair trial. But it seems rather apparent to me that any person serving on a jury would be bound to have some prejudice against a Communist, and it would be extremely difficult to find—well, I suppose there may be a good deal of truth in that, depending on what you mean by prejudice.

Q. If you define a Communist as a person who advocates the overthrow of our form of Government by force or [fol. 39] violence, I suspect you would find a great many of us that would entertain some prejudice against them, just like we have a prejudice against murderers or others who commit offenses. I have never known that that prejudiced people who were charged with crimes from getting a fair trial. Do you think Communists are treated different from others who commit offenses against the government, Mr. Levy?

A. I don't believe that it is—well, Your Honor, exactly what do you mean when you say that they are treated differently?

Q. Well, as I understood you, you said that you considered it impossible for a Communist to get a fair trial.

A. Well, Your Honor, I didn't mean to say that——

Q. I may have misunderstood you, or may not have interpreted it right.

A. I meant to say it is highly unlikely that a Communist would get a fair trial in the sense that a jury would be picked that would examine only the evidence produced during that trial, and not preconceptions toward Communists. In that sense, I believe it is very difficult for a Communist to get a fair trial.

Q. My point was that we have a great many offenses for which people are put on trial here, crimes of violence and so forth. Do you think that a man charged with undertaking to overthrow the Government by force and violence doesn't get as fair a trial as one charged with murder?

A. Your Honor, it is not so much the crime that is committed as the way it is publicized. If, for months on end, a particular criminal were blown up in the newspapers, radio and so forth, and shown as being—as threatening anyone's [fol. 40] personal existence, as threatening the whole social

order, I believe that he would find it very difficult to get a fair trial, as well as a Communist now finds it difficult to get a fair trial.

Q. What you are saying is that the newspapers and radio exert too much influence on the people generally, whether it is good or bad? I might not argue that proposition with you.

A. (No answer.)

Questions by Judge Hannay:

Q. With reference to your views on capital punishment, do you think you would have the same compelling urge to write to Judge Reeves, if the jury has or should today bring in a verdict of guilty and recommend the death penalty for the two murderers of the little child up there in Kansas City?

A. Your Honor, I probably would not have the same compulsion, because although these people will probably get the death penalty, it does not involve—I don't believe that involves a principle of Civil Liberties that the Rosenberg case did involve.

Q. You are not a married man, are you?

A. No, sir.

Q. You have no children?

A. No, sir. Well, I—I do believe that those people have demonstrated such anti-social tendencies that they should be kept away from society, imprisoned until they show sufficient psychological reorientation that they would not possibly commit these crimes again. But I do not believe that they should be put to death. I don't think that the deterrent effect of that punishment is as great as it is reputed to be. Those crimes keep happening time and time [fol. 41] again. I don't—and that makes me doubt the deterrent effect of such punishment.

Questions by Judge Connally:

Q. How old a man are you, Mr. Levy?

A. 26, Your Honor.

Q. Lived in New York all your life until you came down here?

A. Yes, sir.

Q. How long have you been in Texas?

A. Off and on since 1948, September.

Q. I see. You came down shortly after getting out of the service, I take it?

A. No, sir. After the service I—I got out of service in July of '46. I went back to school.

Q. In New York?

A. Yes, sir.

Q. Is that where you went to the City College and got, what was it, a B. A. degree?

A. Bachelor of Science degree.

Judge Hannay: What branch of the service were you in, Mr. Levy?

Mr. Levy: The Navy.

Judge Hannay: Excuse me, Judge.

By Judge Connally:

Q. Did you belong to any organizations there among the student body, while you were in the City College of New York?

[fol. 42] A. I belonged to the Concert Bureau, to the Government and Law Society, and I think to the F. D. R. young Democrat group.

Q. I didn't understand that last one.

A. The name it was going under at that time was The F. D. R. Young Democrats.

Q. Oh, F. D. R.; Franklin D. Roosevelt, I see.

A. Yes.

Questions by Judge Kennerly:

Q. Through what means did you learn of or meet your present employer?

A. I'm sorry, Your Honor?

Q. How did you meet your present employer?

A. I met him—I met him when I went to a concert at the Music Hall, through a girl I had been taking out at that time.

Q. Through a what?

Judge Connally: A young lady.

Q. Oh?

A. A young lady, and she introduced me to him. That was approximately—that was while I was going to law

school. I later met him when I went through the Scanlan Building looking for a job. I applied at practically every law firm in the building. I remembered him at that time, and he told me that at some time in the future he might possibly have an opening for me.

Q. Did you meet him between the time you first met him and the time you applied for employment?

A. I don't believe so, Your Honor.

Q. Did you have any communications with him?

[fol. 43] A. Not that I remember, Your Honor.

Q. What sort of a meeting was that where you met him in the Music Hall?

A. This young lady I had been going out with knew that I was going to get out of law school soon. She took me over to meet him. It was a very brief introduction. I told him I was in law school, and I was going to be graduating soon. At that time he made no mention of any employment, and I didn't think anything further would come of it, and that was the extent of my knowledge in association with him.

Questions by Judge Hannay:

Q. You say you are not a Communist, and never have been?

A. Yes, sir.

Q. And you have never voted—the only two times you have voted have been the last two?

A. That's right, Your Honor.

Q. Have you ever attended, whether you knew about it at the time or learned it afterwards, you might say a Communist meeting?

A. The only time I attended a Communist meeting was once when I was a student at CCNY. They invited, under the sponsorship of the American Youth for Democracy, they invited a speaker, I think his name was Marcantonio.

Q. The gentleman who was a member of Congress from New York at that time?

A. Yes, sir, and I was interested in seeing what he had to say, but I did not consciously at any other time attend a Communist meeting.

Q. Did he run in '48?

A. I don't remember, Your Honor.

[fol. 44] You voted in New York in '48?

A. Yes, sir. I think he may have been defeated during that election. I know he didn't represent my district at that time.

Judge Hannay: I see.

Questions by Judge Kennerly:

Q. Have you attended any such meetings in Houston?

A. No, sir. I don't know of their existence, and I certainly would not go out of my way to attend them, Your Honor.

Questions by Judge Connally:

Q. Have you made any speeches or addresses to any groups or to organizations? Do you make a habit of doing that sort of thing, Mr. Levy?

A. No, sir, I don't.

Q. Being invited, you know, to attend an organization of any kind?

A. No, I have never been invited. Occasionally at this Emerison Club of the Unitarian Church, well, we all engage in discussions, sometimes, on political subjects, and that is the extent of my——

Questions by Judge Hannay:

Q. One point, just to make sure; I have almost gotten to it, but just to make it clear: I believe one evidence of a Communist is the fact that he doesn't believe in a Supreme Being. What is your thought on that matter?

A. Well, Your Honor, I am aware that Lenin called religion the opiate of the people. But it seems to me that [fol. 45] in France, anyway, and in Italy, there are some very religious people who do happen to be Communists. I don't—Communism does, as far as I know, discourage belief in God. But I don't think necessarily a Communist has to be an atheist. Probably most of them are, but I don't think logically one would have to be.

Q. Well, I was asking about your individual beliefs, if you care to tell me, whether you did or did not believe in a Supreme Being, you yourself.

A. I believe, Your Honor, that there is, some unknown power that has created the universe. But——

Q. You don't believe——

A. I don't adhere to any orthodox religious point of view.

Q. You don't believe in any personal God?

A. Well, Your Honor, I am not sure I know exactly what you mean. If you mean——

Q. Well, just to make it as plain as I can make it, do you believe in God or don't you?

A. I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is.

Questions by Judge Kennerly:

Q. Do you worship the Supreme Being, and believe in him?

A. I don't believe so. Not in any formalized manner.

Judge Kennerly: Anything further?

Judge Connally: Anything else you want to tell us, Mr. Levy?

[fol. 46] Mr. Levy: Well, Your Honnor, I can't think of any better reply to the argument that one should not associate with the unpopular than that answer which was made by one of my ancestors, a Galilean rabbi, who as you know, was recorded as having said, if I remember my Bible studies, in the Gospel of Luke, that, "I come to save those who are"—Zacchaeus was the man's name; he was a tax collector, something of a publican, or a very unpopular man, very despised in his community—and he asked Jesus, "Why do you come and seek me? Surely you must know that I"—I am paraphrasing now—"Surely you must know that I am a tax collector." And Jesus told him something to the effect that the Son of Man comes to save those who are lost.

The only way we can—inferring from that story, the only way we can beat the Communists is not with guns, but to beat their ideas with our better ideas, to save them from their own self-destruction.

Judge Kennerly: Have you finished?

Mr. Levy: Yes, Your Honor.

Judge Kennerly: The matter will be regarded as submitted. We will notify the Clerk of our decision, and the Clerk will notify you.

Mr. Levy: Thank you, Your Honor.

[fol. 47] Judge Kennerly: Court will recess under the rules.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT, APPROVING BAR COMMITTEE'S REPORT AND RECOMMENDATION THAT BEN G. LEVY BE DENIED ADMISSION TO THE BAR OF THIS COURT AND SO ORDERED.—Filed November 24, 1953

Before Kennerly, Hannay, and Connally, District Judges:

Per Curiam: Local District Court Rule 5 provides for *the* regulates the Admission of Attorneys to the Bar of this Court. Ben G. Levy, who resides in Houston, in this District and Division, and who has been licensed by the Supreme Court of Texas to practice in the Texas Courts files his Application to be admitted to the Bar of this Court under such Rule.[1]

[fol. 48] Such Rule provides that when such an Application for admission to the Bar is filed, it shall be referred to the Bar Committee provided for in such Rule, and such Committee, in such manner as it may deem proper, shall make an investigation of the fitness, competency, and qualifications of the Applicant.[2]

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[1] The applicable portion of such Rule is as follows (*underscoring* ours): "Any attorney who resides in the State of Texas and who has been heretofore or may be hereafter licensed by the District or Superior Courts of the State of Texas, and is a member in good standing of the Texas State Bar, *whose private and personal character shall be unexceptional,* and who is competent to practice in this Court, may be admitted to the Bar of this Court in the manner hereinafter set fourth."

[2] The applicable portion of such Rule is as follows (underscoring ours): "For the purpose of examining into and reporting on the fitness, competency, and qualifications of all applicants for admission to the Bar of this Court, there is hereby created for each Division of the Court where the

In accordance with such Rule, Applicant's Application was referred to such Bar Committee. The Committee has investigated Applicant, and has reported, recommending that he be not admitted to the Bar of this Court.

It will be observed from such Rule that the proceedings before such Committee may be either what may be called informal, consisting of investigations and inquiries by the Committee, interviews with Applicant, etc., or may be what may be called formal with the Committee holding formal hearings, summoning witnesses, administering oaths, taking testimony, etc. The practice or procedure in the District has generally been that proceedings before such a Committee are informal. Apparently the hearing of Applicant's Application by the Committee was informal.

Complaining of the findings and conclusions of the Commi-tee, Applicant had the right to move here for a re-reference to the Committee and for a formal hearing before the Committee, or to file exceptions to the Report of the Committee as made. He has chosen the latter course, and

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Court shall deem necessary a committee of three members of the Bar of this Court, to be appointed by the Judges of this Court as a standing committee for such purpose. One member of such Committee shall be designated Chairman. When any application is filed with the Clerk, he shall, after making a record of same in a book to be kept for that purpose, immediately refer the same to the committee in charge, transmitting to the Chairman thereof the Original Application and attached Exhibits. *Such Committee, as soon as such application is referred to it, shall, in such manner, as it may deem proper, at once make an investigation of the fitness, competency, and qualifications of the applicant,* and for such purposes the committee shall have the power given a Master of this Court under Rule of Federal Procedure 53 to summon witnesses, administer oaths, and take testimony by deposition or otherwise, when in its opinion it is desirable to do so, and shall file a report in writing, showing the result of such investigation, within thirty days there-[fol. 49] after, unless the Court may extend such time for a longer period and shall with its report return to the Clerk such Original Application, Exhibits, and other papers."

filed his Exceptions to the Report, and we have accorded him thereon a full and lengthy hearing.

Whether the hearing before the Committee be informal or be formal, all applicants carry the burden of showing [fol. 50] that their private and personal characters are unexceptional, and that they are fit, competent, and qualified to practice in this Court. Applicant failed to convi-ce the Committee that he should be admitted to the Bar of this Court, and it has recommended that his Application be denied. We have examined his Application, the Committee's Report, and his Exceptions, and have given him a full hearing. We approve the Committee's Report and Recommendation that Applicant be denied admission to the Bar of this Court. It is so ordered.

However, Applicant shall have the right, at any time after the expiration of one year from this date, to again apply for admission to this Bar.

The Clerk will regard this as an Order, and will record it on the Minutes of the Court, and furnish Applicant with a copy.

Done at Houston, Texas, this November 24, 1953.

(S.) T. M. Kennerly, United States District Judge,
Allen B. Hannay, United States District Judge,
Ben C. Connally, United States District Judge.

[fols. 51-52] In United States District Court

Notice of Appeal—Filed December 3, 1953

Notice is hereby given that Ben G. Levy, Applicant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order approving the Bar Committee's Report and Recommendation that Ben G. Levy be denied admission at this time to the Bar of the above United States District Court, as more fully set out in said Order, and entered in this action on November 24, 1953.

Dated at Houston, Texas, this third day of December, 1953.

(S.) Ben G. Levy, Attorney at Law, 901 Scanlan Building, Houston 2, Texas, CA-9608.

Appeal Bond. Omitted in printing.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] In United States Court of Appeals For The Fifth Circuit

No. 14886

In the matter of: Application of Ben G. Levy for admission to practice in the U. S. District Court, Southern District of Texas.

Argument and Submission.—May 24, 1954

On this day this cause was called, and after argument by Bernard A. Golding, Esq., for applicant and Tom M. Davis, Esq., for amicus curiae, was submitted to the Court.

[fol. 55] In The United States Court of Appeals For The Fifth Circuit

No. 14886

In the matter of: Application of Ben G. Levy for admission to practice in the U. S. District Court, Southern District of Texas.

Appeal from the United States District Court for the Southern District of Texas.

Opinion.—June 23, 1954

Before Strum, Circuit Judge, and Dawkins and Hooper, District Judges.

Hooper, District Judge: Ben G. Levy, Appellant, filed application for admission to the Bar of the United States District Court, Southern District of Texas, and his application pursuant to Local Rules of Court was referred to a Bar Committee for investigation. After an informal in-[fol. 56] vestigation and upon vote of the entire Committee, an adverse recommendation was filed with the

Court. Objections to this report were filed by applicant and the matter came on to be heard before three District Court Judges, who adopted the report of the Bar Committee and refused the application. As our affirmance of such order by the District Court is predicated upon procedural grounds, no attempt will be made to discuss fully the merits or demerits of applicant's cause.

The application for admission to the Bar was filed in accordance with Rule 5(b) of the Local Rules of the District Court, which provided among other things, that any attorney residing in the State of Texas, licensed by the District and the Superior Court of said State, and a member in good standing of the Texas State Bar "whose private and personal character shall be unexceptional" and who is competent to practice in said Court, may be admitted to the Bar in the manner provided by such rule. The rule provided that the application shall be referred to the Bar Committee and such Committee "in such manner as it may deem proper, shall make an investigation of the fitness, competency and qualifications of the applicant." It was provided the Committee "shall have the power given a Master of this Court under Rule of Federal Procedure 53, to summon witnesses, etc." It appears from the record that the procedure as to this Committee in the District Court had generally been informal and so it was in this instance.

Applicant filed his objections to the foregoing adverse [fol. 57] report of the Bar Committee contending among other things, that the whole Committee was not present at the hearing thereon, that "the rationale behind the Committee's adverse recommendation, it seems fair to state, is the Applicant's 'association' with Morris Bogdanow, who, according to the Committee report, ' . . . is generally considered to be a member of the communist party.'" Further, that the Committee procedure in this instance was highly arbitrary and capricious, motivated by prejudice and reliance on wholly inadmissible evidence. Thereupon the District Court set down this matter for a hearing at which hearing the following colloquy occurred:

"Judge Kennerly: The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission

to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953 from that Committee.

"I am informed, Mr. Levy, that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.

"As I understood the rules, Mr. Levy had two courses open to him. One was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to [fol. 58] the report, and we are here to hear you now Mr. Levy, on your exceptions. Do you still want to pursue that course?

"Mr. Levy: Yes, Your Honor.

"Judge Kennerly: All right. You may proceed."

Applicant, thereupon, not under oath, made to the judges what might be termed a declaration as to his personal and political creed, consuming more than thirteen pages of the record, to which discourse apparently the trial judges gave patient attention. Thereupon, the following colloquy occurred:

"Judge Kennerly: I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.

"Mr. Levy: Yes, Your Honor.

"Judge Kennerly: But we, of course, are glad to have your statement and your views about these matters."

[fol. 59] Thereupon applicant made further statements and at his own suggestion he was carefully questioned by members of the Three Judge Court, during the course of which he disclosed his political affiliations, his liberal views, his fraternal, religious and political connections, and even his religious beliefs. When asked whether he believed in God he answered: "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is," that he did not worship in any formalized

manner. He described his efforts in behalf of the defendants in the Rosenberg case. He denied any communistic connections implied from his employment by a local attorney whose reputation according to the views of the Bar Committee, was communistic.

This statement by the applicant to the Court was made at a hearing held in open court. It was not under oath, and it did not alter the fact that he was then taking exception to the report of the Committee in the nature of a report of a Master in Chancery.

It is provided by law that a Master in Chancery, unless otherwise directed by the order of reference, shall file with his report a transcript of the proceedings, of the evidence, and the original exhibits. "The Court shall accept the Master's Findings of Fact unless clearly erroneous." Any party may serve written objections thereto. "The Court after hearing may adopt the report or may modify [fol. 60] it, or reject it in whole or in part, or may re-commit it for further investigation." See Rule 53(e)(1)(2), Federal Rules of Civil Procedure.

The trial judges correctly followed the above rule, gave the applicant his choice of remedies thereunder, explained to him his right to have the matter re-committed to the Bar Committee for a full hearing before all members thereof, but applicant knowingly and voluntarily declined that suggestion and saw fit to rely upon exceptions to the report. Compare *Goldsmith vs. Board of Tax Appeals*, 270 U.S., 117.

Applicant seems to take the position that he was being tried by the Bar Committee on charges preferred against him, overlooking the principle that the burden of proof was on him pursuant to the Local Rule aforesaid, to show that his private and personal character was unexceptional.

He concedes that he has no constitutional right to practice law, that that is a matter of privilege. This principle of law is so well established that it does not require discussion. See 7 C.J.S., p. 708. It is interesting to note that recently the Circuit Court of Appeals for the District of Columbia has ruled that the refusal of the District Court to grant such an application is an administrative function and it is not appealable. *Brooks vs. Laws*, 208 F. 2d 18.

The District Judges in this instance did not permanently close the doors of the court to the admission of Appellant, [fol. 61] but expressly reserved to him the right within twelve months thereafter, to renew his application. The record evidences the apparent purpose upon the part of the District Judges to deal fairly with the applicant. All presumptions of regularity must be entertained by this Court concerning the report of the Bar Committee and the order of the Judges. Applicant was expressly offered the privilege of making a record upon which he could appeal, but declined to do so.

The order of the District Court Judges denying his application is affirmed.

[fol. 62] IN UNITED STATES COURT OF APPEALS

No. 14886

In the matter of application of Ben G. Levy for admission to practice in the U. S. District Court, Southern District of Texas.

JUDGMENT—June 23, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the District Judges denying the application of Ben G. Levy for admission to practice in the said U. S. District Court be, and the same is hereby, affirmed;

It is further ordered and adjudged that the Applicant, Ben G. Levy, and the surety on his appeal bond herein Fidelity & Deposit Company of Maryland, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 63] IN UNITED STATES COURT OF APPEALS

No. 14886

In the matter of application of Ben G. Levy for admission to practice in the U. S. District Court, Southern District of Texas.

ORDER AMENDING OPINION—July 10, 1954

The opinion by this Court in the above stated case is amended by striking therefrom the following paragraph, to-wit:

This statement by the applicant to the Court was made at a hearing held in chambers at his own request, it was not under oath, and it did not alter the fact that he was then taking exception to the report of the Committee in the nature of a report of a Master in Chancery.

A new paragraph shall be inserted in lieu thereof, which shall read as follows:

This statement by the applicant to the Court was made at a hearing held in open court. It was not under oath, and it did not alter the fact that he was then taking exception to the report of the Committee in the nature of a report of a Master of Chancery.

[fol. 64] IN THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted.]

PETITION FOR REHEARING—Filed July 12, 1954

To The Honorable The Justices of The Circuit Court of Appeals, Fifth Circuit:

A

Petitioner is the Appellant in this cause.

B

On June 23rd, 1954, this Court affirmed the judgment of the United States District Court of the United States for the Southern District of Texas (Houston Division).

[fol. 65] C

The decision and opinion presents an interpretation and legal significance which gives rise to the belief that several portions of the record were either misunderstood or escaped the attention of this Court.

For instance, this Court states that the hearing was held *in chambers* (5); whereas, it was held *in open Court*, and newspaper reporters, as well as the general public, had full access to the courtroom.

In an unprecedented appellate procedure, this Court permitted adverse counsel to read and quote, dehors the Record, in open Court, from a previous edition of "LIFE" Magazine for the purpose of attempting to show that Petitioner indulged in unorthodox thinking.

Further, the Court completely bypassed the constitutional issues presented; selected a few passages bearing upon his political and religious views from the Record to buttress its decision, although the whole Record abundantly established that Petitioner had sustained the burden of proving requisite character and fitness for admission to the Bar and his ability to take the oath of one of its members. If the limitations imposed upon Petitioner become the law of this land, it is not idle to predict that we must be prepared to lose the Cokes, the Jeffersons, the Cardozos, the Holmeses and others who were, in their day, considered unorthodox.

D

The decision constitutes a departure from a well-settled course of opinions from the Supreme Court, notably *In Re Summers*, 325 U.S. 561; *Garner* v. *Board of Public Works*, 341 U.S. 716; *Wieman* v. *Updegraff*, 344 U.S. 183; and [fol. 66] *Application of Charles J. Steinbugler*, 297 N.Y. 713, 77 N.E. 2d 16, wherein the New York Court of Appeals held that a claim of exemption from military service upon conscientious and lawful grounds, without proof of insin-

cerity or disloyalty, was *not* evidence bearing on an applicant's character or fitness for admission to the Bar.

In the instant case, Petitioner, despite evidence that he was qualified to be admitted and to take the oath, was denied admission solely because of unorthodox opinions on philosophical and political matters. To be specific, (5) the fact that Petitioner "did not worship in any formalized manner," and expressed an opinion "in behalf of the Defendants in the ROSENBERG Case," (in which, at least, one Justice of the United States Supreme Court concurred, as well as the Pope in Rome) was unduly emphasized and his constitutional right to intellectual independence grossly deemphasized.

This Court states (5-6), quoting Rule 53 (E) (1)(2), F. R. C. P. that "The (District) Court *after hearing* may adopt the report or may modify it, or reject it in whole or in part, *or may re-commit it for further investigation.*" Thus, if the District Judges regarded the evidence before them as insufficient, they had *full authority* under this Rule, *on their own motion*, to re-commit the Report to the Bar Committee after the hearing granted Petitioner. Since they did not do so, it is fair to infer that they did not consider the prior proceedings to be defective, but rather that they, purely by implication, adopted the Bar Committee's view of the *merits* of the case. The issues in this cause are so far-reaching and basic that Petitioner respectfully requests this Court also to evaluate the case *on its merits*, expressly.

This Court held, in substance, that although Petitioner [fol. 67] had two alternatives open to him, both expressly allowed by the Rules (3), he is to be penalized for electing the one rather than the other.

If the Bar Committee thought it did not have enough factual data before it to decide competently on Petitioner's application, it would never have taken the grave action it did in recommending rejection of his application on such religious and political grounds. It is not difficult to understand why Petitioner, after this autocratic treatment, confronted with the alternative to appeal the question to this Court, chose not to re-submit his application to the Committee.

These fundamental questions are of such vital importance

to the administration of Federal Law and the role of Court and Legislature in governing admission to practice law as well as protection of intellectual differences peculiarly needed in the Bar, as to warrant allowance of this Petition and reversal of this cause.

If what this Court has written in this cause be the law, then it is clear that further encroachment upon the liberties of individuals will be encouraged and the possibility of securing redress from officialdom unchanged will be delimited and negatived.

It is submitted that the threat to the individual liberty concealed in this decision should not be minimized, particularly, not in times when reasons for disregarding such guaranteed liberties vouchsafed by the First and Fifth Amendments, United States Constitution, by certain cliques and factions, are fomented.

This decision is one in which there is involved questions of utmost and outstanding importance.

[fol. 68] The bitter cry for justice on the part of those denied the right to intellectual independence throughout the ages ought not to be ignored.

Petitioner prays this Court to grant the Petition for rehearing.

Respectfully submitted, Bernard A. Golding, 432 Niels Esperson Bldg., Houston, Texas, Attorney for Petitioner, On Appeal Only.

I certify that this Petition for Rehearing is being presented in good faith and not for purposes of delay, and that a copy has been furnished Respondent.

Bernard A. Golding, 432 Niels Esperson Bldg., Houston, Texas, Attorney for Petitioner, On Appeal Only.

[fol. 69] I

The Court erred in holding that Petitioner was properly denied admission to practice because:

"* * * he did not worship in any formalized manner."

and, because of,

> "* * * his efforts on behalf of the Defendants in the Rosenberg Case."

in violation of the First and Fifth Amendments, United States Constitution.

II

The Court erred in holding that Petitioner was properly denied admission to practice, *not* because the evidence or Record disclosed that he had not discharged the burden of proof, or because he did not otherwise qualify, but because:

> he (Petitioner) declined to re-submit his application to the Bar Committee which had already evinced its hostility to him, and no further information could have been supplied the Bar Committee had it been re-committed.

in violation of the Due Process Clause, Fifth Amendment, United States Constitution.

III

The Court erred in holding that in affirming such denial to practice it did not offend Due Process of Law, and that [fol. 70] the evidence and procedures used in the absence of substantial evidence justified affirmation of this cause.

Wherefore, premises considered, Petitioner respectfully prays for Rehearing in this cause; that oral argument be granted; that the Judgment entered be withdrawn, the cause be reversed, and for such other and further relief, as Petitioner may be justly entitled.

Respectfully submitted, Bernard A. Golding, 432 Niels Esperson Bldg., Houston, Texas, Attorney for Petitioner, On Appeal Only.

Tom Martin Davis of Baker, Botts, Andrews & Shepherd, Niels Esperson Building, Houston, Texas, and Frank J. Knapp of Butler, Binion, Rice & Cook, Gulf Building, Houston, Texas, represent Houston Bar Association.

[fol. 71] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—July 20, 1954

Motion for rehearing filed by appellant July 12, 1954 is after due consideration, denied.

* * * * * * *

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1954

No. 394

In the Matter of Application of Ben G. Levy for Admission to Practice in United States District Court, Southern District of Texas, Petitioner.

ORDER ALLOWING CERTIORARI.—Filed November 22, 1954.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

OCT 8 1954
HAROLD B. WILLEY, Clerk

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals,
Fifth Circuit,

[redacted]

BERNARD A. GOLDING,
432 Niels Esperson Building,
Houston, Texas,
Attorney for Petitioner

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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IN THE

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OCTOBER TERM, 1953

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals, Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above styled cause on June 23, 1954.

Citations to Opinions Below

The decision of the trial court appears in the Record (pp. 47-50), and the corrected decision of the Court below is reported in 214 Fed. 2d 331, and is printed in Appendix B hereto, *infra*, p. 13. Petition for Rehearing (64-68), filed on July 12, 1954, was overruled without written opinion (71).

Jurisdiction

The trial court's judgment was rendered on November 24, 1953 (47-50); the corrected opinion of the Court below was entered on June 23, 1954 (55-61), *infra*, p. 13. A timely Petition for Rehearing, filed on July 12, 1954 (64-70), was denied on July 20, 1954, without written opinion.

Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Question Presented

Is the right to practice law in the United States Court to be denied an otherwise acceptable person simply because he holds unorthodox views? *(Denying Petitioner admission to practice in the United States District Court constituted an abuse of discretion to the extent that it offends due process of law).*

Constitutional Amendments Involved

The constitutional provisions involved are the First Amendment, United States Constitution, and the Fifth Amendment, United States Constitution. They are printed in Appendix A hereto, *infra*, p. 12.

Statement

Petitioner, aged twenty-six, an honorably discharged veteran of the United States Navy in World War II, a native of New York, but now a citizen of Texas, was a member in good standing of the State Bar of Texas (7). In June, 1953, he applied for admission to the Bar of the United States District Court in Houston, Texas. His application conformed, in every particular, to the Rule covering such cases (3-7).

Acting according to the Rule, the Court referred the application to a Bar Committee of three members (47-48) for "investigation of the fitness, competency, and qualifications of the applicant" (48).

One member of this Bar Committee held *one* interview with Petitioner (10). The other members of this Bar Committee, at *no* time, confronted, interrogated, or in any way examined the Petitioner (10). Nevertheless, the Committee, through its Chairman, recommended against Petitioner (7-9). Petitioner excepted to the Committee's Report, and was granted a hearing by Judges Kennerly, Hannay and Connally, of the Houston Division, Southern District of Texas (9 ff). These United States Judges approved the Bar Committee's report, and denied Petitioner admission to the Bar of the Federal Court, but without prejudice against his applying again at the end of one year (50). The basis of the Committee's report, resulting from *one* interview by the Chairman, later approved by the aforesaid Judges, was that Petitioner was associated with an attorney, "who is *generally considered* to be a member of the Communist Party" (8). The facts developed *in open court* before the three mentioned Judges clearly establish that the "association" was as a low-salaried employee in said law office (17).

Petitioner had obtained this job as an impecunious young lawyer only after failing (during the present business recession) to find employment in several larger law firms, oil companies, and insurance companies (16). Although such accusation was made against Petitioner's employer by the Chairman of the Bar Committee *alone*, it was never established that such was true, the Bar Committee Chairman stating that he—meaning the employer *(not Petitioner)*—"is *generally considered* to be a member of the Communist Party". "He is regarded as a Communist openingly (sic) and also in publications." His "Communistic views" are "a matter of *common knowledge* to the Bar and to the newspapers" (8). Petitioner declares again and again (and wishes to be put under oath concerning all he says, 27), that *"I am not now and never have been a member of the Communist Party.* I don't believe in using force and violence to overthrow the Government, or to effect social change, and so I could never conceivably be such, a member of the Communist Party" (14, 43). He says, "I would classify my own political views as liberal, for which I make no apologies. I happen to be, as perhaps distinguished from the Chairman of the Committee, an admirer of Franklin Roosevelt. I voted for Harry Truman, and for Adlai Stevenson in the last campaign" (17, 30). He worked in campaign headquarters for Stevenson (29), and attended meetings of the Young Democrats (29). During the hearing in the trial court, he was questioned specifically about membership in various organizations, which revealed that he belonged to *nothing more subversive* than the Young Adult Professional Club at the YMCA, the Adult Group at the Jewish Community Center, the Young Democrats of Harris County, and the Emerson Group of the Unitarian Church (28-29). In college *(City College of New York)* he belonged to the

Concert Bureau, the Government and Law Society, and the Franklin Delano Roosevelt Young Democrats (42). When asked if he ever attended Communistic meetings, he told the Court that when he was a student in New York City, he had gone to a student meeting at which the late Congressman Marcantonio spoke (43), but no other such meeting.

Petitioner attends both the Temple Emanu El and the First Unitarian Church in Houston, and pledges a part of his income in the support of the latter (28). He believes in Divine Guidance (38). He does not "adhere to any orthodox point of view," but, he says, "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is" (45).

Petitioner thinks Franklin Delano Roosevelt was a great man (17), and quotes at length and with approval from Judge Learned Hand and Mr. Justice Douglas (19-27).

From questions by the trial judges it was developed, but apparently, not received warmly by the three Judges, that:

(A) Petitioner is interested in Civil Liberties (19, 21, 30);

(B) He thinks Houston is not a liberal-thinking and liberal-voting community (32-33);

(C) He thinks that, if a Communist were on trial, "it is highly unlikely that * * * a jury would be picked that would examine only the evidence produced during the trial, and not preconceptions toward Communists" (39).

The most dreadful thing that Petitioner ever did was to write President Eisenhower asking clemency for the Rosen-

bergs (30), because he does not believe in capital punishment (34, 41), and thought the death penalty in such case was unprecedented, and not justified by the evidence (30, 36-37). He says: "I am painfully aware that my views on this are probably identical with the majority of Communists; nevertheless, it is not because it is the Communist point of view that I am upholding it, *it is because it is mine*" (34).

Despite these statements and facts of the case, the trial court rejected Petitioner's application to practice in the United States Courts.

The Court below (55-61) completely ignored and refused to pass upon the constitutional issues and questions raised. It held, in effect, that Petitioner should recommit his same request to the *same* Bar Committee for a full hearing, one year later, as suggested by one of the trial Judges (59-60). Petition for Rehearing (64-68), urging the same issues herein, was overruled without written opinion (71).

The lower court in affirming the ruling of the trial court placed undue emphasis on the fact that admission to practice law was a "privilege" (60). In failing to squarely meet the constitutional issues and questions placed before the Court below, it completely disregarded the fact that while admission to practice law is often called a "privilege", it is one which may not be denied arbitrarily or on condition of the "surrender of rights derived from the Constitution" (WHEELING STEEL CORPORATION v. GLANDER, 337 U.S. 562, 571; and IN RE SUMMERS, 325 U.S. 561, 566). Likewise, the lower court disregarded the unquestioned principle that among the rights not to be surrendered which are appropriate to this matter are those incorporated

in Amendments One and Five, of the Constitution of the United States.

The Court below failed completely to recognize, although it was specifically pointed out, the limitation upon the exercise of the First and Fifth Amendments' freedoms resulting from the refusal of the trial court to permit Petitioner, a qualified and an acceptable person, to practice law in the United States Courts. The result of the Court failing to determine this cause upon its merits rather than on a procedural basis only, reinforced the application of an "unconstitutional condition", to the privilege to practice law in the United States Courts in Houston, despite the fact that Petitioner is a member in good standing of the State Bar of Texas.

Reasons for Granting the Writ

(1) The decision of the Court below in this cause, is directly in conflict with the decision of this Court in IN RE SUMMERS, 325 U.S. 561, insofar as the Court below failed to consider the principle enunciated in the SUMMERS Case, *supra,* which held that this Court had jurisdiction to entertain an appeal from refusal to grant Applicant allowance to practice law in State or Federal Court, or both. While the Court in IN RE SUMMERS, 325 U.S. 561, found no discriminatory purpose in the pertinent section of the Illinois Constitution (Art. 12), it rejected the contention of Petitioner in that cause. One year after the SUMMERS Case was decided, in GIROUARD v. UNITED STATES, 328 U.S. 61, it was decided that a resident alien conscientious objector could *not* be barred from national citizenship should he agree to perform non-combatant duties in the armed forces. Clearly, the GIROUARD decision cast doubt

upon the authority of the SUMMERS Case, in which the Petitioner's contention was rejected, and highlights Mr. Justice Black's dissent in the SUMMERS Case, *supra*. It is noteworthy that in the SUMMERS Case, 325 U.S. 561, Justice Black in his dissenting opinion stated that he did not believe that a man who was qualified in every respect could be barred from practicing law because he was a conscientious objector.

Clearly, imposition of an unconstitutional condition such as disagreement with unorthodox opinions and beliefs on philosophical and political questions resulting in the denial of the privilege of practicing law, should not stand.

(2). This case is important and should be resolved by this Court because the decision stemming from the Court below failed to determine the case upon its merits but rather on some vague procedural basis. This case presents a vital and fundamental question affecting the lives of all Americans. It poses the question: Is the right to practice law in the United States Courts to be denied an otherwise acceptable person simply because he holds unorthodox views? Unless the courts are prepared to answer this question, which Petitioner submits, under the circumstances, must be answered in the negative, the right and freedom of all our citizens are in jeopardy.

If this Court should fail to examine this cause on the merits and write on the subject, thus giving the Courts below a guide to follow, and thus eliminate fear and hysteria from those who pass upon the qualifications of persons seeking admission to the Federal Bar, then many of our citizens may well ask themselves: Is the Freedom then only of the "Pickwickian sort, enshrined in English doggerel",

"It's because of the magna carta
As were signed by the barons of old,
Then we may do as we please,
So long as we do what we're told."

This particular cause may affect only Benjamin G. Levy, a young man, little known, but the issue presented is of great importance to the Bar and to our Country. This Court must write and write boldly insuring the maintenance of freedom and judicious judgment in cases such as this.

(3) The question presented is of great importance in the admission of the imposition of *unconstitutional conditions* which deny the privilege of actions and freedom accorded under pertinent Amendments of the United States Constitution. This case does *not* involve, as it did in IN RE SUMMERS, 325 U.S. 561, a person who cannot take an oath to support the Constitution.

It is *not* disloyalty which has apparently prevented Petitioner's admission to the Federal Bar, but dissimilarity of opinion which he has expressed on philosophical and political matters. For this, no one should be excluded from engaging in the practice of law, the greatness of which profession has come from its unique attraction for men of intellectual independence, be they "correctly" independent or "incorrectly" independent. The charge has never been made, and cannot be made, that Petitioner is a Communist; it is that, in the opinion of one man, *his employer*, based on hearsay and newspaper gossip, is a Communist. If his employer is a Communist, it is the *Bar Committee's duty*, as it would be the duty of any good American, to present evidence that will bring the employer to justice. Mere slanderous gossip *should not* be admitted nor tolerated.

This Court in IN RE SUMMERS, 325 U.S. 561, expressly held that a justiciable controversy existed, but found no State action violating the Fourteenth Amendment in the denial of admission. The Circuit Court, in this cause, ignored this feature and proceeded on a somewhat vague procedural view. Since the advent of IN RE SUMMERS, *supra*, the New York Courts in APPLICATION OF CHARLES J. STEINBUGLER, 297 N.Y. 713, 77 N.E. 2d 16, held that a claim of exemption from military service upon conscientious and lawful grounds, without proof of insincerity or of disloyalty, was *not* evidence bearing on an applicant's character or fitness for admission to the Bar. In the instant case, there is *no* evidence of disloyalty nor does there exist any legal factor disqualifying Petitioner from being admitted to practice in the United States Courts, especially since he is a member in good standing in all of the Texas State Courts, and volunteered to be examined, under oath, upon all matters touching upon his qualifications.

(4) If so well settled and fundamental a right to the effect that imposition of conditions upon the granting of a privilege vouchsafed by the First and Fifth Amendments, as here, is to be bartered away as the price to be paid for the privilege to practice law, then all constitutional guarantees are subject to be destroyed by an indirect process, outwardly voluntary, which is, in reality, compulsory and fraught with coercion.

(5) To sustain the ruling of the Court below would be tantamount to creating a novel situation, to-wit: that one who enters the practice of law and desires to be admitted to the United States Courts having been accepted by the Courts of the State in which he lives, can be forced to sacrifice his civil rights. Thus, we revert to the plight of

the Christians under Roman rule, the oppression and annihilation of the Jew under Nazism, the infamous inquisition in Spain, and the discriminatory treatment visited upon the founders of this Nation by the intolerable policies of George III.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERNARD A. GOLDING,
432 Niels Esperson Building,
Houston, Texas,
Counsel for Petitioner

APPENDIX A

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment,
United States Constitution.

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Fifth Amendment,
United States Constitution.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 14886

THE MATTER OF:

APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN THE U. S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

Appeal from the United States District Court for the Southern District of Texas

---

(June 23, 1954)

Before STRUM, Circuit Judge, and DAWKINS and HOOPER, District Judges.

HOOPER, District Judge: Ben G. Levy, Appellant, filed application for admission to the Bar of the United States District Court, Southern District of Texas, and his application pursuant to Local Rules of Court was referred to a Bar Committee for investigation. After an informal investigation and upon vote of the entire Committee, an adverse recommendation was filed with the Court. Objections to this report were filed by applicant and the mat-

ter came on to be heard before three District Court Judges, who adopted the report of the Bar Committee and refused the application. As our affirmance of such order by the District Court is predicated *upon procedural grounds,* no attempt will be made to discuss fully the merits or demerits of applicant's cause.

The application for admission to the Bar was filed in accordance with Rule 5(b) of the Local Rules of the District Court, which provided among other things, that any attorney residing in the State of Texas, licensed by the District and the Superior Court of said State, and a member in good standing of the Texas State Bar "whose private and personal character shall be unexceptional" and who is competent to practice in said Court, may be admitted to the Bar in the manner provided by such rule. The rule provided that the application shall be referred to the Bar Committee and such Committee "in such manner as it may deem proper, shall make an investigation of the fitness, competency and qualifications of the applicant." It was provided the Committee "shall have the power given a Master of this Court under Rule of Federal Procedure 53, to summon witnesses, etc." It appears from the record that the procedure as to this Committee in the District Court had generally been informal and so it was in this instance.

Applicant filed his objections to the foregoing adverse report of the Bar Committee contending among other things, that the whole Committee was not present at the hearing thereon, that "the rationale behind the Committee's adverse recommendation, it seems fair to state, is the Applicant's 'association' with Morris Bogdanow, who, according to the Committee report, " * * * is generally considered to be a member of the communist party." Further, that the Com-

mittee procedure in this instance was highly arbitrary and capricious, motivated by prejudice and reliance on wholly inadmissible evidence. Thereupon the District Court set down this matter for a hearing at which hearing the following colloquy occurred:

"Judge Kennerly:

"The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953 from that Committee.

"I am informed, Mr. Levy that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.

"As I understood the rules, Mr. Levy, had two courses open to him. One was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to the report, and we are here to hear you now Mr. Levy, on your exceptions. Do you still want to pursue that course?

"Mr. Levy:
Yes, Your Honor.

"Judge Kennerly:
All right. You may proceed."

Applicant, thereupon, not under oath, made to the judges what might be termed a declaration as to his personal and political creed, consuming more than thirteen pages of the record, to which discourse apparently the trial judges gave patient attention. Thereupon, the following colloquy occurred:

"Judge Kennerly:

"I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.

"Mr. Levy:

"Yes, Your Honor.

"Judge Kennerly:

"But we, of course, are glad to have your statement and your views about these matters."

Thereupon applicant made further statements and at his own suggestion he was carefully questioned by members of the Three Judge Court, during the course of which he disclosed his political affiliations, his liberal views, his fraternal, religious and political connections, and even his religious beliefs. When asked whether he believed in God he answered: "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is," that he did not worship in any formalized manner. He described his efforts in behalf of the defendants in the Rosenberg case. He denied any communistic connections implied from his employment by a local attorney whose reputation according to the views of the Bar Committee, was communistic.

This statement by the applicant to the Court was made at a hearing held (in open Court) at his own request, it was not under oath, and it did not alter the fact that he was then taking *exception to the report of the Committee in the nature of a report* of a Master in Chancery.

It is provided by law that a Master in Chancery, unless otherwise directed by the order of reference, shall file with his report a transcript of the proceedings, of the evidence, and the original exhibits. "The Court shall accept the Master's Findings of Fact unless clearly erroneous." Any party may serve written objections thereto. "The Court after hearing may adopt the report or may modify it, or reject it in whole or in part, or may re-commit it for further investigation." See Rule 53(e)(1)(2), Federal Rules of Civil Procedure.

The trial judges correctly followed the above rule, gave the applicant his choice of remedies thereunder, explained to him his right to have the matter re-committed to the Bar Committee for a full hearing before all members thereof, but applicant knowingly and voluntarily declined that suggestion and saw fit to rely upon exceptions to the report. Compare Goldsmith vs. Board of Tax Appeals, 270 U.S. 117.

Applicant seems to take the position that he was being tried by the Bar Committee on charges preferred against him, *overlooking the principle that the burden of proof was on him pursuant to the Local Rule aforesaid, to show that his private and personal character was unexceptional.*

He concedes that he has no constitutional right to practice law, that that is a matter of privilege. This principle of law is so well established that it does not require discussion. See 7 C.J.S., p. 708. It is interesting to note that recently the Circuit Court of Appeals for the District of Columbia has ruled that the refusal of the District Court to grant such an application is an administrative function and it is not appealable. Brooks vs. Laws, 208 F. 2d 18.

The District Judges in this instance did not permanently close the doors of the court to the admission of Appellant,

but expressly reserved to him the right within twelve months thereafter, to renew his application. The record evidences the apparent purpose upon the part of the District Judges to deal fairly with the applicant. All presumptions of regularity must be entertained by this Court concerning the report of the Bar Committee and the order of the Judges. Applicant was expressly offered the privilege of making a record upon which he could appeal, but declined to do so.

The order of the District Court Judges denying his application is AFFIRMED.

A True copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

FEB 1 1 195
HAROLD B. WILLEY,

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

IN RE: BEN G. LEVY, *Petitioner*

On Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE PETITIONER

AIMER ET PENSER: C'EST LA VERITABLE VIE DES ESPRITS—VOLTAIRE

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No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

IN RE: BEN G. LEVY, *Petitioner*

On Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 37-41) is reported at 214 F. 2d 331.

Jurisdiction

The judgment of the Court of Appeals was entered June 23, 1954 (R. 41-42). The Petition was filed during the week of October 5, 1954, and was granted November 22, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

The questions presented, in part, reach deeply into the heart of many troublesome facets in American life, particu-

larly in the realm of belief and of advocacy. These questions are whether, on matters of personal belief and of religious worship, the standards have been appropriately applied; and whether, from a perusal of the procedures employed in arriving at the result, there emerges a record that completely negates the standards of procedural due process which have become inseparably encased with "the cherished judicial tradition embodying the basic concepts of fair play".[1]

In other respects, the questions presented display crucial issues of constitutional law. The decree against Petitioner is challenged as illegal because it denies guarantees of free speech, and of liberty embodied in the Bill of Rights and has no reasonable relation to the purpose for which Petitioner was denied admission to practice in the Federal Court. The contention that an applicant shown to be honorable and acceptable for admission may be denied license to practice because of utterances, beliefs and thoughts in which he is protected by the First Amendment, strikes a deadly blow at the "area of allowable thought",[2] and of allowable liberty.

Constitutional Amendments Involved

The constitutional provisions involved are the First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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[1] **Morgan v. U. S.**, 304 U.S. 1, 22.
[2] **Schneiderman v. U. S.**, 320 U.S. 118, 139.

and the Fifth Amendment, *United States Constitution*:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Statement

Petitioner, aged twenty-six, an honorably discharged veteran of the United States Navy in World War II, a native of New York, but now a citizen of Texas, was a member in good standing of the State Bar of Texas (R. 5). In June, 1953, he applied for admission to the Bar of the United States District Court in Houston, Texas. His application conformed, in every particular, to the Rule covering such cases (R. 2-5).

Acting according to the Rule, the Court referred the application to a Bar Committee of three members (R. 34-35) for "investigation of the fitness, competency, and qualifications of the applicant" (R. 34).

One member of this Bar Committee held *one* interview with Petitioner (R. 7). The other members of this Bar Committee, at *no* time confronted, interrogated, or in any way examined the Petitioner (R. 7). Nevertheless, the Committee, through its Chairman, recommended against Petitioner (R. 5-6). Petitioner excepted to the Committee's report, and was granted a hearing by Judges Kennerly, Hannay and Connally, of the Houston Division, Southern District of Texas (7 ff). These United States Judges approved the Bar Committee's report, and denied Petitioner admission to the Bar of the Federal Court, but without prejudice against his applying again at the end of the one year (R. 34). The basis of the Committee's report, resulting from *one* interview by the Chairman, later approved by the aforesaid Judges, was that Petitioner was associated with an attorney, "who is *generally considered*

to be a member of the Communist Party" (R. 5). The facts developed *in open court* before the three mentioned Judges clearly establish that the "association" was as a low-salaried employee in said office (R. 12). Petitioner had obtained this job as an impecunious young lawyer only after failing (during the present business recession) to find employment in several larger law firms, oil companies, and insurance companies (R. 11). Although such accusation was made against Petitioner's employer by the Chairman of the Bar Committee *alone*, it was never established that such was true, the Bar Committee Chairman stating that he—meaning the employer (*not Petitioner*)—"is *generally considered* to be a member of the Communist Party". "He is regarded as a Communist openingly (sic) and also in publications." His "Communistic views" are "a matter of common knowledge to the Bar and to the newspapers" (R. 6). Petitioner declares again and again (and wishes to be put under oath concerning all he says, R. 19), that *"I am not now and never have been a member of the Communist Party.* I don't believe in using force and violence to overthrow the Government, or to effect social change, and so I could never conceivably be such, a member of the Communist Party" (R. 10, 31). He says, "I would classify my own political views as liberal, for which I make no apologies. I happen to be, as perhaps distinguished from the Chairman of the Committee, an admirer of Franklin Roosevelt. I voted for Harry Truman, and for Adlai Stevenson in the last campaign" (R. 12, 22). He worked in campaign headquarters for Stevenson (R. 20), and attended meetings of the Young Democrats (R. 20). During the hearing in the trial court, he was questioned specifically about membership in various organizations, which revealed that he belonged to *nothing more subversive* than the Young Adult Professional Club at the Y M C A, the Adult Group at the Jewish Community Center, the Young Democrats of Harris County, and

the Emerson Group of the Unitarian Church (R. 20). In college (*City College of New York*) he belonged to the Concert Bureau, the Government and Law Society, and the Franklin Delano Roosevelt Young Democrats (R. 30). When asked if he ever attended Communistic meetings, he told the Court that when he was a student in New York City, he had gone to a student meeting at which the late Congressman Marcantonio spoke (R. 31), but no other such meeting.

Petitioner attends both Temple Emanu El and the First Unitarian Church in Houston, and pledges a part of his income in support of the latter (R. 20). He believes in Divine Guidance (R. 27). He does not "adhere to any orthodox point of view", but, he says, "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is" (R. 33).

Petitioner thinks Franklin Delano Roosevelt was a great man (R. 12), and quotes at length and with approval from Judge Learned Hand and Mr. Justice Douglas (R. 13-20).

From questions by the trial judges it was developed, but apparently, *not* received warmly by the three Judges, that:

(A) Petitioner is interested in Civil Liberties (R. 13, 15, 21);

(B) He thinks Houston is not a liberal-thinking and liberal-voting community (R. 23-24);

(C) He thinks that, if a Communist were on trial, "it is highly unlikely that * * * a jury would be picked that would examine only the evidence produced during the trial, and not preconceptions toward Communists" (R. 28).

The most dreadful thing that Petitioner ever did was to write President Eisenhower asking clemency for the Rosenbergs (R. 21), because he does not believe in capital punishment (R. 24, 29), and thought the death penalty in such case was unprecedented, and not justified by the evidence (R. 21, 26-27). He says: "I am painfully aware that my views on this are probably identical with the majority of Communists; nevertheless, it is not because it is the Communist point of view that I am upholding it, *it is because it is mine*" (R. 24).

The trial court rejected Petitioner's application to practice in the United States Courts.

The Court below (R. 37-41) completely ignored and refused to pass upon the constitutional issues and questions raised. It held, in effect, that Petitioner should recommit his same request to the *same* Bar Committee for a full hearing, *one year later*, as suggested by one of the trial Judges (R. 39-40). Petition for Rehearing (R. 42-45), urging these issues was overruled without written opinion (R. 47).

The lower court in affirming the ruling of the trial court placed undue emphasis on the fact that admission to practice law was a "privilege" (R. 40). The Court below completely disregarded the fact that while admission to practice law is often called a "privilege", it is one which may not be denied arbitrarily or on condition of the "surrender of rights derived from the Constitution" *(Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571; and *In Re Summers*, 325 U.S. 561, 566). Likewise, the lower court disregarded the unquestioned principle that among the rights not to be surrendered which are appropriate to this matter are those incorporated in Amendments One and Five, of the Constitution of the United States.

Argument

The Argument will be under the following two heads representing the major issues in this cause:

(A) Refusal to grant license to practice in the United States Court upon the evidence reflected by this Record violates due process of law.

(B) Refusal to grant license to practice in the United States Court upon the procedures so employed violates due process of law.

—A—

REFUSAL TO GRANT LICENSE TO PRACTICE IN THE UNITED STATES COURT UPON THE EVIDENCE REFLECTED BY THIS RECORD VIOLATES DUE PROCESS OF LAW.

> "* * * facts do not assess themselves * * * the decisive element is the attitude appropriate for judgment." *(Baumgartner v. U. S.*, 322 U.S. 665, 666-7).

The attitude appropriate for judgment employed by the Courts below is reflected in the sentence:

> "Applicant shall have the right, at any time after the expiration of one year from this date, to again apply for admission to this Bar."

It is respectfully submitted that this does not comport with attitudes appropriate for judgment in this matter.

Since Petitioner is denied admission to practice on the sole basis that he labored for a lawyer who is "imagined" by the Bar Chairman as a Communist, this case assumes a

degree of importance in the realm of constitutional law far greater than that noted in cases involving mere guilt by association. The implications of this decision are that lawyers will have to be careful where they say a thing. They will have to speak two languages, one for the street and the other for the courtroom. There never has been a more absurd principle framed. Its constitutional implications are shocking.

It is a little less than astounding that Petitioner, merely suspected of being *evil* because he worked for a man "imagined" by the Bar Chairman to be a Communist, should, without any evidence, be denied admission to practice and be deprived of the God-given right to earn a living. It is just as astounding that the recommendations of the Bar Committee were not laughed out of Court. We deem it appropriate that an analysis of the evidence be given.

Analysis of the Evidence

I. The Petitioner's Association

1. *What is the nature of Petitioner's alleged association with an alleged Communist?*

Accusation:

> "He is associated with Morris Bogdanow, who is *generally considered*[3] to be a member of the Communist Party" (R. 5).

Facts:

The "association" was as a low salaried employee in the Bogdanow law offices (R. 12). Petitioner obtained this job as impecunious young lawyer only after failing (dur-

[3] Italics in quoted material here and hereafter are supplied.

ing the present business recession) to find employment in several larger law firms, oil companies, and insurance companies (R. 11).

ANALYSIS:

It is a new principle in law that an employee may be held responsible for the deeds and opinions of his employer. Until the three judges announced their decision in the present case, it had been universally held that the direct opposite is the law; that is, that the employer is responsible for the deeds of his employee. This Court is asked to maintain this ancient principle of law, and to set aside the absolutely arbitrary decision of the lower courts which does violence to this ancient legal principle in a manner probably never before perpetrated by any single Federal Judge or group of judges.

2. *Is Morris Bogdanow,*[4] *the Petitioner's "associate", actually a Communist?*

ACCUSATION:

Bogdanow "is *generally considered* to be a member of the Communist Party." "He is *regarded* as a Communist openingly (sic) and also *in publications.*" His "Communistic views" are "a matter of *common knowledge* to the Bar and to the *newspapers*" (R. 5).

FACTS:

A. The grave accusation made by the Bar Committee is obviously based on no concrete fact, but only on pub-

[4] (Bogdanow was admitted to practice in the United States Court of Appeals—Fifth Circuit—on February 17, 1950. He is still enrolled as an attorney in good standing in this Court, **from which Petitioner is excluded).**

lic gossip and irresponsible hearsay. It is the kind of reckless accusation which, *to the shame of this nation in the last few years*, has branded thousands of loyal Americans as Communists. *President Truman, General George Marshall, Justices Frankfurter* and *Douglas* and *Black*, and even *Chief Justice Warren* have repeatedly been "referred to as Communists openly and in publications." It is vaguely alleged that Bogdanow "is generally considered to be a member of the Communist Party." Considered by whom? The only evidence is the unsubstantiated opinion of the Chairman of the Bar Committee, who is himself referred to openly and in publications as an extreme right-wing Republican. This gentleman's views as to what constitutes Communism may well be suspect, particularly in the complete absence of any evidence except what he himself reports as mere gossip.

B. The Chairman of the Bar Committee admits that, in the past, the F. B. I. has been ready enough to inform the Bar Committee whether certain individuals were Communists. But in this case, the F. B. I. "declined" to say that Bogdanow is a Communist (R. 5). The Chairman of the Committee tries to gloss over this failure to secure evidence by "Expressing purely an opinion" (R. 5). But the stubborn fact remains that the only evidence of Bogdanow's alleged Communism is that the Chairman thinks that he "is generally considered" to be a Communist and that "publications" refer to him as such.

ANALYSIS:

A. This kind of loose, unfactual, unverified, hearsay charge, based exclusively on public gossip as interpreted

by an admittedly reactionary character should not be worth a moment's toleration by any rational mind. That three Federal Judges should consider such a charge seriously, and act upon it gravely, shocks one's credulity. Their action can only be regarded as a melancholy commentary on the extremes of panic and hysteria which have lately possessed a people once famous for their courage and hard-headed rationality. This Court is asked *not* to concur in this panic and hysteria, but to exercise its influence to do its part in re-establishing America's traditional heritage of plain and steady common sense. If Bogdanow is a Communist, *it is the Bar Committee's duty*, as it would be the duty of any good American, *to present evidence that will bring him to justice*. Mere slanderous gossip should *not* be admitted or tolerated.

B. Even if Bogdanow were a Communist (and *no* evidence indicates that he is), it is pertinent to point out that the subject of investigation and dispute is *not Bogdanow*, but Levy. Bogdanow's political convictions, whatever they may be, do *not* necessarily have any bearing on Petitioner's political convictions. The fact, for example, that the three Federal Judges who conducted this hearing are "associated" does *not* prove that their political views are identical, or that one approves of the political views of the other. It has *not* been customary in American courts for one man to be held responsible for the crimes (real or imagined) of another. Once again, therefore, the decision rendered in this hearing violates an ancient and well-established principle of American law. This Court is asked to re-assert this almost sacred principle, and not to sanction the Communistic Russian principle that

the friends, relatives, and associates of an alleged criminal must be punished along with the criminal himself. This Court is asked to insist that Ben G. Levy be judged by the *"fitness, competency, and qualifications"* of Ben G. Levy, *not those of Morris Bogdanow.* The Bar Committee itself *did not suggest by so much as a word* that it considered Ben G. Levy to be a Communist, or to have Communistic leanings. The only charge against him was that he was "associated" with a man who is vaguely suspected of being a Communist. If it suspected Levy of being a Communist, *why* did it not say so, and present reasons for saying so? Instead, in violation of fundamental Americanism and in concession to Russianism of the worst sort, it holds Levy responsible for the alleged sins of somebody else. This Court is asked to reassert the ancient Anglo-Saxon and Christian principle that every man shall answer, before the bar of earthly and heavenly justice, for his own sins, and no one else's.

II. The Petitioner Himself

1. *Is Petitioner a Communist?*

Accusation:

In this incredible and unprecedented case, the Bar Committee did not make the slightest suggestion that the Petitioner himself is a Communist (R. 5-6). Instead, the Bar Committee deemed Appellant "unfit, incompetent, and unqualified" only because one of his associates was "generally considered" to have Communistic leanings.

FACTS:

A. Petitioner declares again and again (and wishes to be put under oath concerning all he says, R. 19), that *"I am not now and never have been a member of the Communist Party.* I don't believe in using force and violence to overthrow the Government, or to effect social change, and so I could never conceivably be such, a member of the Communist Party" (R. 10, 31.)

B. The Petitioner says, "I would classify my own political views as liberal, for which I make no apologies. I happen to be, as perhaps distinguished from the Chairman of the Committee, an admirer of Franklin Roosevelt. I voted for Harry Truman, and for Adlai Stevenson in the last campaign" (R. 12, 22). He worked in campaign headquarters for Stevenson (R. 20), and attended meetings of the Young Democrats (R. 20).

C. The Petitioner, on being questioned specifically about membership in certain organizations, revealed that he belonged to nothing more subversive than the Young Adult Professional Club at the YMCA, the Adult Group at the Jewish Community Center, the Young Democrats of Harris County, and the Emerson Club of the Unitarian Church (R. 20-21). In college he belonged to the Concert Bureau, the Government and Law Society, and the F. D. R. Young Democrats (R. 30). Asked if he had made a custom of attending Communist meetings, he said that, when he was a student in New York, he had gone to a student meeting at which Congressman Marcantonio spoke (R. 31), but no other such meeting.

D. Petitioner attends both the Temple Emanu El and the First Unitarian Church in Houston, and has pledged a part of his income in support of the latter (R. 20). He believes in Divine Guidance (R. 27). He does not "adhere to any orthodox religious point of view," but, he says, "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is" (R. 33).

E. He thinks Franklin Roosevelt was a great man (R. 12), and quotes at length and with approval from Judge Learned Hand and Justice Douglas (R. 13-19).

F. From the questioning, the following points were developed, and were, apparently, *not* received warmly by the three judges:

1. Petitioner is interested in Civil Liberties (R. 13, 15, 21).

2. He thinks Houston is not a liberal-thinking and liberal-voting community (R. 23-24).

3. He thinks that, if a Communist were on trial, "it is highly unlikely that * * * a jury would be picked that would examine only the evidence produced during the trial, and not preconceptions toward Communists" (R. 28).

G. Apparently the most dreadful thing the Petitioner ever did was to write the President asking clemency for the Rosenbergs (R. 21). He did this because he does not believe in capital punishment (R. 24, 41), and thought the death penalty in this case was unprecedented, and not justified by the evidence (R. 21,

24-25). His own words indicate something of his honesty and sincerity: "I am painfully aware that my views on this subject are probably identical with the majority of Communists; nevertheless, it is not because it is the Communist point of view that I am upholding it, *it is because it is mine* (R. 24). (In this connection, it might be well to recall that many people, including the Pope in Rome, who *were certainly not Communists* felt as did the Petitioner about the Rosenberg case, and wrote to the President asking for clemency).

ANALYSIS:

Every word the Petitioner uttered in the hearing makes it kindergarten-clear to any intelligent and well-informed mind that the Petitioner is a typical young "liberal"—perhaps idealistic and unrealistic in the opinion of older men hardened by life, but certainly not a Communist and not a disloyal American. In his own words: "My creed is what I conceive to be the American Creed * * * I am opposed to oppressive discrimination in any form. I am opposed to the arbitrary and unwarranted use of power and authority, from whatever source, and against any individual group. I believe in Government by law, not by men, and that the law is above any man, and not any man above the law" (R. 10-11). He is of the stock of that 47 percent of Americans who voted for Adlai Stevenson in 1952, and the 50-odd percent who voted for Franklin Roosevelt repeatedly. He himself sums up his position very accurately: *"My views are somewhat unorthodox in that I believed in the New Deal as Franklin Roosevelt expressed it"* (R. 23). To be sure,

some extreme right-wingers have often declared "openly and in publications" that the New Dealism is Communism. But a Federal Court should know better. This Court is asked to re-assert the right of a man to have a liberal American point of view, to belong to the Democratic Party, to be concerned over the civil liberties of Americans, and to approve of the views of *Franklin Roosevelt, Judge Hand,* and *Justice Douglas* without being penalized by being shut out from a possible means of gaining an honest living. It is true that a small majority of people in America turned away from the Petitioner's type of liberalism in 1952. But belonging to a minority party should not deprive a man of the protection of the Courts against prejudice, whim, and hearsay served up as law and logic.

III. The Three Judges

Some idea concerning the mental horizons of the three judges who decided against Petitioner may be gathered from the direction the hearing assumed under their guidance.

1. Judge Hannay and the Petitioner indulged in an argument as to whether the Republicans or the Democrats carried Houston in 1952 (R. 24).

2. Judge Connally and the Petitioner indulged in an argument as to whether the Supreme Court should review all death sentences (R. 24-25).

3. Judge Connally and the Petitioner argued over whether Houston is an unusually conservative city or not (R. 23).

4. Judge Hannay was apparently perturbed over Petitioner's espousal of the cause of Civil Liberties, and

grilled him several times on that point (R. 20, 21, 24). (The chief point against the Petitioner here was that he was interested in, but not a member of, a group headed by a Professor of Applied Christianity at Princeton Theological Seminary) (R. 22).

5. All three judges asked the Petitioner questions on religious problems that *no man* yet has ever succeeded in solving (R. 32-33).

6. Judge Hannay made the pronouncement: "I believe one evidence of a Communist is the fact that he doesn't believe in a Supreme Being" (R. 32). (Perhaps no less learned statement was ever made from a Federal bench. If Judge Hannay's statement were correct, hundreds of millions of Hindus, Japanese, and Indo-Chinese have been Communists for many thousands of years. "In India the Sankya philosophy, which is one of the great systems of Hindu thought, Buddhism, and Jainism are atheistic, each arguing against an eternal Creator."—*International Encyclopedia*, Vol. II, p. 307. Nor is it recorded that *Darwin, Huxley, Haeckel, Shelley, Thomas Hardy, Joseph Conrad, W. Somerset Maugham*,[5] and a hundred others who might be mentioned were Communists in their atheism).

7. All the judges concurred in declaring that "all applicants carry the burden of showing that their private and personal characters are unexceptional" (R. 50). Once again, there appears here a direct reversal

[5] "I'm glad I don't believe in God. When I look at the misery of the world and its bitterness, I think that no belief can be more ignoble." (A Writer's Notebook, p. 63).

of the spirit of American law. In America a man has customarily been considered honorable until he is proved otherwise. These three judges state deliberately and by implication that they considered the man dishonorable until he proves himself otherwise. This may not be *technical* violation in an informal case of this kind. But it violates the *spirit*—which is an even worse offense. This Court is asked to re-assert an American's inherent and inalienable right to a good name in the courts until it is proved, beyond the shadow of a doubt, that he is undeserving of that good name.

IV. The Unspoken Charge

The Bar Committee's report contained one significant short paragraph buried in the midst of vague innuendos about Communism: "The Petitioner was born and reared in New York and came to Houston a few years ago" (R. 6).—A second point not mentioned anywhere is that the Petitioner is a Jew.

In the absence of all other damaging evidence against the Petitioner, in the absence of any argument that appeals to ordinary reason and common sense, in the presence of a long series of trivialities of gossip, hearsay, and illogic—the question arises:

Was the Petitioner rejected because he was a New York Jew?

No argument can be pressed here, because the charge is unspoken. All that the mind can do is to question, to suspect, and to wonder what the decisions would have been if Jews had been the Judges.

No legal argument, however nice, can obscure the fact that the standards appropriate to the performance of judicial functions in the sensitive area of thought, belief, and advocacy have *not* been maintained in this case. It can hardly be said that this record is one "characteristic of democratic rule". Nor is it a record in conformity with the "amenities that distinguish a free society". We respectfully submit that there is nothing lacking in this mosaic of mischief—unless we wish to regard the Bill of Rights as only a bill of privileges for persons desiring to impose their own opinions on others. These rights are called "the great, the indispensable democratic freedoms" *(Thomas v. Collins,* 323 U.S. 516, 530) because these freedoms (which attach to Petitioner throughout this entire proceeding) are "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society". *Thornhill v. Alabama,* 310 U.S. 88, 103. Through the free use thereof in a free society "the remedial channels of the democratic process remain open and unobstructed". *Minersville School District v. Gobitis,* 310 U.S. 586, 599. The exercise of such freedoms is "vital to the maintenance of democratic institutions". *Schneider v. State,* 308 U.S. 147, 161. "Therein," remarked the late Chief Justice Hughes, "lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon,* 299 U.S. 353, 365.

The foundation for the Bill of Rights does not admit of a distinction between Democrats and Republicans, Protestants, Catholics, Buddhists, Atheists, or people of different ancestry. The value of thought or of a concept destined to benefit modern society or the possibility of such contributing to the good of the people does not depend on whether

it emanates from a white man or a black man, a Protestant, a Catholic, or a Jew.

This cause takes on no different aspect from any other case in which the Court is put to determining where a claim of freedom ends and the sovereign power begins. *Board of Education v. Barnette*, 319 U.S. 624.

Freedom, that is, of thought and of belief, has a preferred place in our scheme of government; in sooth, it has a "sanctity and a sanction not permitting dubious instructions." *Thomas v. Collins*, 323 U.S. 516, 530. "And it is the character of the right, not of the limitation, which determines what standard governs the choice" (Ibid).

Undoubtedly if Petitioner had been willing to be insincere and answer all the questions put to him in a manner pleasing to the inquirers, he would now be practicing in the United States Courts. But this would have been neither manly nor honest. If he had been so weak-willed as not to protect his own legal and constitutional rights, how could it ever be expected that he should be trusted to protect the rights of a client in any Court?

As matters stand, Petitioner is *penalized for his opinions* and for believing in matters upon which the wisest of men have failed to agree.

The decision of the Committee and affirmance by the Courts below violate elementary notions of justice and fair play, *Hebert v. Louisiana*, 272 U.S. 312, 316-317, in that, among other reasons, the due process defects constitute an *abridgment of the right to free speech* under the First and Fifth Amendments, which find no justification in this Record.

UNCONSTITUTIONAL CONDITIONS

Whether the doctrine of unconstitutional conditions springs from the Constitution itself or from the early cases of *Bank of Augusta v. Earle*, 38 U.S. 519, and *Paul v. Virginia*, 75 U.S. 168, it is clear that to require Petitioner to surrender constitutional safeguards and waive his legal rights for the purpose of practicing in the United States Courts, is against public policy, *Frost and Frost Trucking Co. v. R. R. Com. of California*, 271 U.S. 583, and places an imposition upon Petitioner *not* consistent with principles of natural justice or with the Constitution. This Court in *Thomas v. Collins*, 323 U.S. 516, recognized the problem of Texas requiring Collins to obtain an organizer's card before addressing a mass meeting, as one of "unconstitutional conditions" and reversed the Texas Courts on the grounds of free speech and free assembly. It held that Texas could not condition that Collins first procure an organizer's card before appearing before an assembly to make an address. In a series of cases which discriminated against voting by Negroes, such discrimination was held unconstitutional, then authorized; only for a later decision to reinstate the earlier ruling. *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Grovey v. Townsend*, 294 U.S. 699; *Smith v. Allright*, 321 U.S. 667. This is a privilege which the State or Government authority may not condition since Negroes cannot be deprived on "color" grounds of their privilege to vote.

Likewise, the United States Court has power to control, condition, and limit the privilege to practice within its walls. But it has no power to condition the granting of the "privilege" to Petitioner by unconstitutional limitations; such as requiring Petitioner to accept with Promethean constancy elaborate myths that the individual's private opinions must

always agree with those of the majority—that members of the liberal wing of the Democratic Party must not have the privilege of practicing in the United States courts—that to oppose capital punishment is un-American—that to adhere to the principles of the Unitarian Church and the Reformed Jewish Church is to run dangerously close to Communism—that to seek liberation from the tyranny and fear which have gripped America in the McCarthy era is bad Americanism. This Court is respectfully asked to find that a United States District Court may not limit the privilege to practice in the United States Court to just those individuals who believe precisely as some member of a Committee or even as some Judge might view our Constitution and the Bill of Rights. The privilege to practice in such Court may *not* be determined by a judge on the basis that he believes "one evidence of a Communist is the fact that he doesn't believe in a Supreme Being" (R. 32), since,

> " 'In every sense' a judge's religious beliefs should not consciously affect his attitude toward his witnesses or his interpretations of the law." *Ly Shew, Etc. v. John Foster Dulles, Etc.,—C.A. 9—per Denman, J.*, decided December 30, 1954, not yet officially reported.

These cases have peculiar application to Petitioner because, in effect, he is asked to waive his constitutional safeguards and right to speak freely on legitimate issues in order to obtain a license to practice in the United States Courts. One does not waive his rights when applying for admission to the Bar, yet that is what has taken place in this instance under the guise that the Committee and the Courts below are dealing with a "privilege" conferred by the Courts. "Privilege" though it may be, it does not confer unmitigated license to disregard the constitutional mandates extended to Petitioner.

The unconstitutional conditions imposed upon Petitioner may not be enforced, even though the Bar Committee, or the Courts below, decided to withhold that which is regarded merely as a "privilege". *Garner v. Board of Public Works*, 341 U.S. 716, at 725; *Wiemann v. Updegraff*, 344 U.S. 183, 191, 192; *Barsky v. Board of Regents*, 347 U.S. 442.

Since dissent of opinion and intelligent discussion of controversial issues are the foundation of a democratic government, admission to the United States Court should not be refused this Petitioner because of that fact or because it is "imagined" that his employer was a member of the Communist Party, particularly when there is not the slightest evidence to that effect.

Petitioner should not be refused the privilege of practicing in the Federal Courts simply because he may or may not express a philosophical belief, or an opinion, on matters with which the Bar Committee and the Courts below do not agree. Two Justices of this Honorable Court in their hearts and minds felt that the Smith Act ought to have been held unconstitutional, an opinion which was in disagreement with the other members of the Court. Should the members of this great Court who do not see eye to eye with the majority of the members of this great body be penalized because they hold and express different opinions? An affirmative answer not only would constitute an injustice but would seriously impair the intellectual diversity peculiarly needed in the Bar and in our Courts.

Later generations looking at these issues in retrospect may very well come to the conclusion that this generation was overwhelmed by unfounded fears and reacted, as frightened people do, by taking the most drastic measures to obviate

the threat. It is not a denial to the jurisdiction maintained by the other members of this Court to adopt the wisdom of the late Mr. Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

License to practice law may not be denied arbitrarily, or on condition of the "surrender of rights derived from the Constitution of the United States". *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571; *In Re Summers*, 325 U.S. 561, 566; *Communications Assn. v. Douds*, 339 U.S. 382.

This decision, in effect, attempts to put all would-be lawyers seeking the right to practice in United States Courts in a certain given mold, and to penalize anyone who does not conform. The mortal danger to our democracy is that it will stop growing. It either grows or dies. There is no such thing as just remaining the same, in one mold, without shaking the very foundation upon which our government is founded. Such a philosophy assumes that our democracy is a "fait accompli" because Jefferson, Washington, and others of our forefathers risked their fortunes and lives to win it, and assumes that it is now our good fortune to enjoy this inheritance. It imposes a doctrine that what is left for us to do is simply to administer property, pocket the profits, and congratulate ourselves on the Fourth of July on the magnificence of our inheritance. This doctrine seems to be that we must maintain the "status quo" at all costs and any young, sensitive mind, such as the Record in this case reveals Petitioner to be, must be denied privileges that he otherwise would enjoy, simply because he does not conform. Such an

attitude cannot help the dynamics of American democracy. This nation became great and is great not in "that we have already created a full living democracy but in that we have created a priceless opportunity to create it."

If he were to submit to the decree of the Court below and wait a year and go back again before the same committee or a different committee bound by this decision, as the committee indeed would be; if he is honest, and indeed he is, he would have to reiterate what he said and lose his chance to practice or be forced to either genuinely abandon his aspirations, or in subterfuge speak words which the committee members like to hear. Petitioner earnestly feels that he cannot and must not do so. To do so would be tragic. Real tragedy occurs not when a man aspires and fails, but when he fails to aspire. The Committee and the Courts below may have been prompted by their zeal to protect freedom, but as President Eisenhower himself stated with good reason:

> "In the very excessive zeal to protect freedom we may destroy it."

We may lose, as he put it:

> "The battle from within that we are trying to win without * * * as we attempt the solution of this great problem of security."

The action of the Bar Committee in laying down a rule that an applicant may not be allowed to practice in the United States Courts if his opinions are not the opinions of the majority not only destroys the diversity which has distinguished the legal profession but confuses dissimilarity of opinion with disloyalty and violates a previous right protected by the Federal Constitution.

Thus, the conditions imposed by the Bar Committee and the Courts below *are as effective a deterrent to thought and speech as direct prohibition would be.* One does not voluntarily waive his right—he is coerced because of the basic importance of the privileges embraced in his economic, social, and personal well-being.

Too often lawyers forget that it is:

> "* * * the noblest faculty of the profession to * * * stand forth on all occasions as the bulwark of private rights against the assault of power, even under the guise of law * * *." *(Sharswood, An Essay on Professional Ethics, American Bar Association Reports,* Vol. 32, pp. 53-54).

This Record is not evidence to support a determination with consequences so grave as here; and, upon it, refusal to grant license to Petitioner to practice in the United States Court may not rest without violent disregard to the Fifth Amendment.

The most famous line in Magna Charta (Article 39) pledges Due Process of law not only for him who is imprisoned or outlawed or exiled, but also for him who is in any other way destroyed. Petitioner has established his fitness for admission to the Federal Bar and his ability to take the oath as one of its members. He should not be excluded for the entertainment of diverse political and philosophical beliefs.

—B—

REFUSAL TO GRANT LICENSE TO PRACTICE IN THE UNITED STATES COURT UPON THE PROCEDURES SO EMPLOYED VIOLATES DUE PROCESS OF LAW.

Matters of substance and of procedure are so intertwined in this matter that it is impossible to ignore one if the other is treated fully. This is made so because of the serious procedural lapses in the Courts below making the procedural defects as important as matters of substance, all of which plainly penalizes Petitioner for the expression of opinions and for the opinions and associations that he is "imagined" to possess.

The inquiry at this point is not whether this aspect or that aspect in the history of the procedure of this case represents the constitutional vice. Rather, it is, on portrayal of the complete procedural history, whether the conclusion which emerges is that of vitiating unfairness, whether the atmosphere enveloping this procedural course is one of unfairness and discrimination of its parts. In substance, did the Bar Committee accredit itself "by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play"? *Morgan v. U. S.*, 304 U.S. 1, 22.

The injustice pierces deeper than the fact that Petitioner has been denied due process because:

A. The hearing before the Bar Committee appointed to pass upon such applicants for admission to practice before the United States Court was wholly inadequate;

B. The Courts below, particularly the hearing in the District Court, failed to supplement or to remedy what had happened (or had not happened) before the Bar Committee;

C. There was relevant evidence that Petitioner wished to give before the full Court—*he even expressed the*

wish to waive all immunities—but he was not permitted to do so;

D. There was positively *no way of knowing that the same results would not occur against Petitioner one year later;*

E. Petitioner could be subjected to successive proceedings with respect to these identical matters.

Basically, whatever may be said of all these points, a procedure which demonstrates all or any part of them cannot survive legal scrutiny.

Whether the guarantee of equal protection is embodied in the due process clause vouchsafed by the Fifth Amendment, it is quite clear that a discriminatory application of legislative or administrative rule "may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment." *Detroit Bank v. U. S.*, 317 U.S. 329, 338.

Consideration of the Bar Chairman's unique method of arriving at the recommendation to the District Court that Petitioner should be rejected adds naught but a black shadow to this chronicle. The Amicus Curiae presentation, in the Court below in adopting the novel approach of the Bar Chairman, demonstrates quite clearly the further pursuit of disregarding concepts of fundamental fairness and, impliedly, at least, refusal to recognize that the Constitution guards against attempts "to wear the accused out by a multitude of cases with accumulated trials", *U. S. ex rel Marcus v. Hess*, 217 U.S. 537, 556.

The incredible argument is pressed by the opposition that Petitioner:

> *"rejected the opportunity to come forward and answer the grave and serious charges against him."*

Certainly, Petitioner was justified in assuming that when his *voluntary offer* to appear before the *whole* Committee (R. 20) was rejected, that there would be no useful purpose served in requesting of the Court that which the Committee denied him. It would be less than human for Petitioner not to be shocked by the grave action of the Committee based on unworthy and wholly inadmissible evidence.

> *"At the beginning of this hearing appellant was afforded a choice of having his application referred back to the Committee* * * * (But) *appellant studiously avoided (this) course which would have resulted in a more thorough investigation being made of him"* (Amicus Curiae Brief below, pp. 11-12; pp. 14, 16, 18).

By inadvertent implication, this argument admits that neither the Bar Committee nor the lower Court made any "thorough investigation" of Petitioner.

It is past the bounds of reason to suppose that Petitioner, having had the experience of the perfunctory investigation of the Bar Committee, and of its unbelievable reliance in rejecting him on the sole grounds of hearsay, gossip, and newspaper talk, would ever again trust the Bar Committee. Could he have reasonably expected justice on a second occasion from a Committee which decided against him, and willing to believe anything evil about him, on the first occasion? *He would have been less than intelligent if he had asked this Bar Committee for a second "investigation".*

> *"The District Court has no duty to accept any applicant until the applicant has shown himself worthy of the honor and public trust"* (Amicus Curiae Brief below, p. 14). *"The burden is on the appellant to prove that he meets all the requirements for admission"* (Amicus Curiae Brief below, p. 17).

This *ex cathedra* statement too easily dismisses "grave and serious" questions involving Constitutional law.

If accepted at face value, the rule summarized in this statement would make it possible for any group of judges to deny a man an honorable means of livelihood by arbitrary decision, without trial, without conviction for any crime or even any fault, but only on hearsay reputation, or for no sound reason at all. Such a procedure violates the letter and the spirit of Due Process. Petitioner contends that, contrary to the argument of the Amicus Curiae below, the District Court *does have a duty* to accept any applicant *unless* the applicant has been shown to be unworthy of the honor and the public trust. If the applicant is shown to be too ignorant to deserve the honor and the public trust, he may be rejected. But *no question was ever raised about this particular applicant's knowledge or wisdom.* Or if the applicant is shown to be normally unworthy of the honor and the public trust, he may be rejected. ***But the only "evidence" ever educed against this particular applicant was hearsay gossip, and newspaper talk.*** No fault in him as been shown.

It is the spirit of the law that a man is held innocent of all offense until he is proved guilty. For a United States Court to require that a man prove himself innocent of every word of gossip, scandal, and whispered attack on his character that has ever been uttered is asking too much of

human nature, and violates every legal principle. It is the duty of the District Court *to assume that the applicant is worthy* of the honor and public trust until it is shown incontrovertibly that he is otherwise. Any variation from this principle is a violation of what is almost the cardinal principle of American law: the right of a man to be regarded as innocent of fault until he is proved guilty.

The law cannot be flouted so flagrantly.

> *"The Committee felt that appellant, with full knowledge of the facts, was associating in the practice of law with a Communist"* (Amicus Curiae Brief below, p. 15).

This assumes as true what is the fundamental point at issue—that Bogdanow, the Petitioner's associate, really was a Communist. Yet no evidence that Bogdanow was a Communist was ever produced; the Petitioner testified before the Court that "His (Bogdanow's) views are *not* Communistic. I have heard him criticize not only the American Government in certain policies, I have heard him criticize the Soviet Government as much as anyone else has criticized the Soviet Government" (R. 13); not even the F.B.I. was willing to say that Bogdanow was a Communist (R. 5); and the only evidence that the Bar Committee itself could find about Bogdanow's alleged Communism was a vague "common knowledge of the Bar" and "newspapers".

In this day when the word "Communist" is applied to any idea unlike that held by the conservative element, when General George Marshall and President Truman have been openly called Communists and traitors, when every American who voted the Democratic ticket in the last twenty-five years *has been accused of treason*—a United States

Court should have some *exact and precise proof* before it gives credence to vague reports that somebody is a "Communist". The word requires exact and precise definition; the Court should not rely on hearsay, gossip, and newspapers. All that can be said certainly of Bogdanow is that "his views are unorthodox" (R. 13). In the opinion of the Bar Committee, these unorthodox views may seem "Communistic"; but the courts should demand more precise definition and information. Vagueness and hearsay are not sufficient basis for decision when the validity and the relevance of American Constitutional law and common law are at stake.

A large portion of the brief of the *Amicus Curiae below* (pp. 15-19) is devoted to the argument that Communists should not be admitted to practice. This point will *not* be argued here. But the *Amicus Curiae must not be permitted to apply this word "Communist" indiscriminately.* The Bar Committee, or rather the Chairman of the Bar Committee, may have the personal privilege of thinking anyone a Communist who is not a McCarthy Republican. But the United States Courts should be more precise in applying the word, and more exact in demanding proof that the application is valid. Hearsay, gossip, and newspaper talk are insufficient.

The argument of the *Amicus Curiae* asserts that Petitioner had "full knowledge of the facts" about Bogdanow's being a Communist. Here again, *the Amicus Curiae below assumes as true what is the fundamental point at issue.*

Is it actually established *as a fact* that Bogdanow was a Communist?

That is one of the main points at issue. The Petitioner is accused of having "full knowledge" of facts about which

nobody seems to have full knowledge—but only hearsay, gossip, and newspaper talk. Again and again, Petitioner declared that he was *not* a Communist and he did *not* think Bogdanow was a Communist. Nothing could be more illogical than this argument, more unjust, or more inimical to the principles of American Constitutional law.

> *"He does not deny that Bogdanow has the general reputation in the community of being a Communist"* (Amicus Curiae Brief below, p. 18).

Petitioner had no occasion to deny this. He was not asked if he knew about Bogdanow's alleged "general reputation"; and he did not say that he knew about it. In the same way, Petitioner did not deny that he had murdered his mother; but by the argument of the *Amicus Curiae below*, Petitioner would be guilty of matricide for not having denied it!

> *"Appellant's willing association with Bogdanow in the practice of law in the face of Bogdanow's general reputation, without making a careful investigation to satisfy himself what the true facts are, indicates a willingness to work for a Communist"* (Amicus Curiae Brief below, p. 16).

(Not being able to prove that Petitioner was a Communist, or that Bogdanow was a Communist, or that Petitioner worked for a Communist, the *Amicus Curiae below is* reduced to arguing about Petitioner's possibly being willing to work for a Communist!)

This argument is directly contrary to fact: (a) There is not the slightest evidence *in this Record* that Bogdanow had a "general reputation" as a Communist—except among the members of the Houston Bar Committee and the vaguely mentioned "newspapers" of Houston. (b) There is *not* the

slightest evidence that the Petitioner had ever heard of this "general reputation" of Bogdanow's—perhaps because Petitioner, being a Democrat who voted for Stevenson and Truman (R. 12), never moved in conservative circles where he could have heard of Bogdanow's "general reputation". (c) Petitioner did declare positively that *he satisfied himself Bogdanow was not a Communist:* "I have had political discussions with him. Surely his views are unorthodox; I am aware of that. *His views are not Communistic*" (R. 13).

In short, there is not a word of truth in this argument of the *Amicus Curiae below.*

There were no charges made against Petitioner which he could be expected to meet and which he would have an opportunity to meet. The findings made by the Bar Committee (meaning the Bar Chairman) as well as the Court were not based on any legal evidence before these bodies. Petitioner was denied the opportunity to present relevant evidence concerning his beliefs and he even expressed, in open court, the wish to waive all immunities, and requested the Court to put all nature of inquiries to him. There were no conclusions of law, either by the courts or the Bar Committee Chairman, which the findings called forth and intended to uphold the results of this matter.

Anyone who cherishes the great Anglo-American tradition of personal liberties sustained by such cases as: *De Jonge v. Oregon,* 299 U.S. 353; *Pierce v. Society of Sisters,* 268 U.S. 510; *Nixon v. Herndon,* 273 U.S. 536; *Fiske v. Kansas,* 274 U.S. 380; *Stromberg v. California,* 283 U.S. 359; *Thornhill v. Alabama,* 310 U.S. 88; *Herndon v. Lowry,* 201 U.S. 242; *Chambers v. Florida,* 309 U.S. 227; *Powell v. Alabama,* 287 U.S. 45; *Near v. Minnesota,* 283 U.S. 697; *Hague v. C. I. O.,* 307 U.S. 496; *Lovell v. Griffin,* 303

U.S. 444—to name only the most familiar, must come to the conclusion that the standards, practices, etc., that apply to administrative and judicial bodies and a Committee set up as an agency of the court to advise it in such matters, have not been respected. No sound reason exists for failure to give the full vigor of the pronouncement of the cited cases to the situation at hand. Not only were considerations of fairness swept aside, the pattern seems to have been to wear Petitioner out with accumulated hearings and, in effect, single "him out for invidious treatment". *Hysler v. Florida*, 315 U.S. 411, 422.

That Petitioner may renew his application "a year later" is no solving phrase. If such were the case, it "would resolve every issue * * * in favor of those in authority and would require us to override every belief thought to weaken or delay execution of their policies". *West Virginia State Board of Education v. Barnette, et al.*, 319 U.S. 624, 636.

> "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights, it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.
>
> "* * * Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 636-637.

Only by the teaching of the *Morgan* Cases, 298 U.S. 468; 304 U.S. 1; 313 U.S. 409, only within the scaffolding of the precepts there stated, only on the firm foundation of unyielding fairness, can such procedural structures be safely built.

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Morgan v. U. S.*, 304 U.S. 1, 20.

Review of the evidence and of the procedural lapses when placed alongside the pronouncements of the *Morgan* Cases, 298 U.S. 468; 304 U.S. 1; 313 U.S. 409, brings to focus more clearly that there was essential unreality in the concept of "fair hearing" as applied to Petitioner. The world in which this decree found its genesis seems to be a world of bewilderment. In such a world of bewilderment, sobriety of judgment does not thrive.

The distinguished Judge Learned Hand tells us that due process "represents a mood rather than a command". The mood of the Bar Committee and the Courts below in rejecting Petitioner's application was anything but cautious. The Record bespeaks the fact that visitations to the untroubled kingdom of Reason were side-tracked and complete reliance placed upon the judgment of a one-man rule in the form of the Bar Chairman. The judgment denies, in effect, that

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. Man being what he is cannot safely be trusted*

*with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. * * *. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171.

"Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due Process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in issuing fundamental justice, it is also a living principle not confined to past instances." *(Ibid,* pp. 173-174).

This Court has, in a long series of decisions, developed a crucial "working principle" for cases in which the scope of constitutional protection of freedom of expression is in issue. That principle is that to justify restriction upon speech or advocacy, nothing less must be shown than that the danger apprehended from the exercise of those rights is imminent.

Justification for such restriction must be affirmative. For "the freedoms of the First Article" occupy "the preferred position" and any fiat infringing upon these freedoms "cannot be sustained by any presumption of validity". *Prince v. Massachusetts,* 321 U.S. 158, 167. It is said that these "freedoms" * * * are to be presumed to be invulnerable and any attempt to sweep (them) away" is "prima facie invalid" *(Ibid,* p. 173).

And, too:

"It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope

of its language the punishment of incidence fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 369; *Herndon v. Lowry*, 301 U.S. 242, 258.

"A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expression, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech." *Winters v. New York*, 333 U.S. 507, 509-510.

There is no evidence that Petitioner would not demean himself in a manner befitting any honest and sincere gentleman of the Bar. All of the evidence and facts in this case convincingly show that this young man is well-read, has studiously applied himself to numerous subjects, aside from that of law, and, in all probability, could do justice to any client in this or any other court, if given a reasonable time to prepare for such service.

We play truant to striking decisions of our past that have tellingly embodied the persistent tradition that one may not be stripped of his right to earn a living without Due Process of Law. Great moments in our judicial history were they when these utterances were made:

"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate * * *." [6]

---

[6] Justice Holmes, in **United States v. Schwimmer**, 279 U.S. 644, 654-655.

"* * * Under our traditions, beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles." [7]

Beliefs should not be attributed to Petitioner when the consequences are to deprive him of liberty and the right to earn a living, by imposing upon him, against evidence to the contrary, one version, rather than another.

Freedom, particularly freedom of speech, must be viewed, not as a monopoly of anointed saints, cliques, or powerful regimes;[8] not as an instrument by which the few may awe the many; not as bestowing on one a prerogative which is not enjoyed by all; but as the property of every human being.

Historically, we know of the evils which freedom, when turned into tyranny has inflicted; how it has dug deep dungeons, kindled fires for the martyr, and invented instru-

---

[7] Justice Murphy in **Schneiderman v. United States**, 320 U.S. 118, 136.

[8] "I deplore * * *, the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them, * * * These ordures are rapidly depraving the public taste.

"It is, however, an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be remedied without being lost." **(Letter of Thomas Jefferson, Padover,** Democracy, 150-151).

"The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters are stagnation and death." **(Lincoln Day, 1898, Address of Mr. Justice Brewer, Government by Injunction,** 15 Natl. Corp. Rep. 848-849).

ments of exquisite torture. Intolerance always shelters itself under the garb of some fancy name, and an espionage of bigotry may as effectually close our lips and chill our hearts as an armed and hundred-eyed police.

The power of a United States Court over applicants for admission to practice is exercised so as to preclude undesirable persons who are unworthy of the trust and honor. However, this authority, like any of its powers, must be exercised in a way showing *some reasonable and justifiable relation* between constitutional grants and the purpose for which the authority and power exists.

Time and again, the "reasonable relation doctrine" has been referred to by this Court and is firmly established as a vital principle. It has been applied to determining whether a prima facie presumption brought into being by the Constitution is proper, and whether the conduct sought to be thwarted bears a reasonable relationship to the purpose for which the authority exists. Cases involving presumptions brought into being by statutes, to mention just a few, are: *Bailey v. Alabama*, 219 U.S. 219, 238; *Taylor v. Georgia*, 315 U.S. 25; *Pollock v. Williams*, 322 U.S. 4; and, *Tot v. U. S.*, 319 U.S. 463. Those embracing the application of the rule of reason to substantive statutory and constitutional provisions are: *Cummings v. Missouri*, 4 Wall (U.S.) 277, 319-320; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535.

The restraints dealt with in the cited cases apply with equal force to proceedings made the basis of this litigation. There must be a *rational relation* between the basis for refusal to admit Petitioner to practice law in the United States Court and the judgment determining the undesirability of an applicant.

Petitioner is denied admission to the United States Court, and is stigmatized in no uncertain terms, not because of the xeistence of any proof of wrongdonig, but because of the "imaginings" of a Bar Chairman, whose written recommendation is adopted by the lower courts. The judgment declaring him unfit to practice in the United States Court is not only without foundation, but is contrary to the constitutional guarantee of free speech and though.

The case of *Cummings v. Missouri,* 4 Wall (U.S.) 277, involving a priest who was convicted for performing his duties without first taking the oath, which he challenged as being invalid, is applicable. This Court held with Cummings, because it was an ex post facto law and because there was no reasonable relation between the requirement of the oath and the purpose for which the State Legislature alone had any right to enact.

The grounds for refusing Petitioner admission to practice in the United States Court embrace thought, speech and conduct vouchsafed by the Bill of Rights and have no *reasonable relation* to the purpose for which judicial authority exists.

Conclusion

The dangers underlying the decision of the Court below require its unalterable rejection.

A. By denying the Petitioner a right to make a living in his chosen profession for no other reason than that he honestly expressed perfectly legitimate opinions that happened not to conform to what a small majority of Americans think, the decision denied, in effect, the Petitioner's constitutional rights to freedom of speech and freedom of religious opinion.

B. By its discriminatory effect, by its assumption that the burden of proving innocence must rest on the Petitioner, by its denial of the Petitioner's constitutional rights in *complete absence* of evidence against him, by its willingness to wear the Petitioner out by subjecting him to repeated examinations and inquisitions, and by its disregard of all reasonable fairness in matters of procedure—this decision violates the letter and the spirit of the Due Process provisions of the Constitution.

If permitted to stand, this decision will operate to curtail the freedom of speech and freedom of thought of all attorneys, and will encourage them to be liars, hypocrites, and cowards instead of honest and courageous servants of the law.

Urgent public interest requires reversal of this judgment.

Respectfully submitted,

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Attorney for Petitioner
(On Appeal Only)

MAR 10 1955
HAROLD B. WILLEY, Clerk

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF HOUSTON BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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No. 394

IN THE

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OCTOBER TERM, 1954

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF HOUSTON BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Houston Bar Association hereby respectfully moves for leave to file a brief Amicus Curiae in this case. The consent of the attorney for the Petitioner was requested but refused.

The interest of the Houston Bar Association in this case lies in its recognition of its duty to the Courts and to the general public to maintain and preserve the highest ideals and standards for the legal profession. In recognition of

that responsibility, members of the Houston Bar Association have assisted the Judges of the United States District Court for the Southern District of Texas in examining the qualifications of all applicants for admission to its Bar. Such an examination was made in connection with the application of the Petitioner herein who was denied admission to Bar membership.

The Petitioner has contended that the order of the District Court Judges denying his admission to Bar membership violated due process of law and invaded certain of his constitutional rights, but he has not denied the right of a court to impose reasonable standards of professional competence and high moral character as requisites for admission to its Bar. It is believed that the brief which Amicus Curiae is requesting permission to file will assist in bringing the constitutional issue into proper focus.

Since no one will appear in support of the action of the District Court and the order of the Court of Appeals unless movant is permitted to file its brief Amicus Curiae, it is submitted that the administration of justice would be assisted by granting this motion.

Respectfully submitted,

LEROY DENMAN MOODY
TOM MARTIN DAVIS
FRANK J. KNAPP
Attorneys for Houston Bar Association

Proof of Service

I, John A. MacDonald, Jr., an attorney in the office of Messrs. Leroy Denman Moody and Tom Martin Davis, attorneys of record for Houston Bar Association, certify that on the 9th day of March, 1955, I served a copy of this Motion on Bernard A. Golding, Esq., counsel of record for Petitioner Ben G. Levy, by delivering the same to the receptionist in his office at 432 Niels Esperson Building, Houston 2, Texas.

John A. MacDonald, Jr.
JOHN A. MACDONALD, JR.

Subscribed and sworn to before me at Houston, Texas, this 9th day of March, 1955.

Irene Outwin
Irene Outwin,
Notary Public in and for
County of Harris,
State of Texas.

FILE COPY

FILED
MAR 28 1955
HAROLD B. WILLEY, Clerk

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AMICUS CURIAE BRIEF OF HOUSTON BAR ASSOCIATION

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF HOUSTON BAR ASSOCIATION

Question Presented

Was the denial to Petitioner of membership in the Bar of the United States District Court an abuse of discretion that offended due process of law?

This was the question raised in the Petition for Writ of Certiorari. Amicus Curiae submits that there is no other issue for it is in complete accord with the contention of Petitioner that the right to practice law in the United States

District Court is not to be denied an otherwise acceptable person simply because he holds unorthodox views. Amicus Curiae does, however, contradict the contention of Petitioner that *he* was an otherwise acceptable person who was denied the right to practice simply because of unorthodox views; that contention assumes as true the fundamental points at issue and it is to that assumption that Amicus Curiae is opposed.

It is further submitted that the embellishments and additional questions now raised in Petitioner's Brief under this heading which were not present in the Petition for Writ of Certiorari should be disregarded as not in conformity with Supreme Court Rule 40(2).

Constitutional Amendments Statute and Court Rule Involved

The following, the pertinent text of which is set forth in Appendix A, page 27 hereof, are involved in this proceeding:

The First Amendment, United States Constitution.
The Fifth Amendment, United States Constitution.
Section 2071, Title 28, U. S. Code.
Rule 5, Local Rules of United States District Court for the Southern District of Texas.

Statement

The Petitioner was enrolled as an attorney in the Supreme Court of Texas on November 17, 1952 and during June, 1953 he applied for admission to the Bar of the United States District Court for the Southern District of Texas (R. 2-3).

Rule 5 of the local rules of the said court sets forth the requirements and procedure to be followed by persons seeking admission as attorneys and specifies that "(one) whose private and personal character shall be unexceptional, and who is competent to practice in this Court may be admitted to the Bar of this Court" (R. 34). Petitioner prepared a required personal statement and obtained two recommendations of resident practitioners of the District; he was then interviewed by the Chairman of the Bar Committee appointed by the Judges of the Court pursuant to Rule 5(c) for the purpose of examining the fitness and qualifications of all applicants. The Committee later recommended against Petitioner's admission to membership in the Bar of the United States District Court for the Southern District of Texas.

The Petitioner filed exceptions to the Bar Committee's report (R. 7) and was granted a full hearing thereon before the three Judges of the Court. At the beginning of the hearing, Petitioner was advised that he had the choice of having his application referred back to the Bar Committee for reconsideration of his application and for the reception of additional evidence of his qualifications (R. 9-10), but Petitioner declined the opportunity and chose to stand on his exceptions.

Thereupon the Petitioner proceeded to address the three District Judges at length (R. 10-19) and then invited questioning from the bench (R. 19) which followed (R. 19-33) until Petitioner acknowledged that he had nothing further to say. The Court then recessed and on November 24, 1953, entered an order approving the Bar Committee's Report and Recommendation that Petitioner be denied admission to the Bar of the Court (R. 34-36). It is to be noted that the order specifically provided that Peti-

tioner "shall have the right, at any time after the expiration of one year from this date, to again apply for admission to this Bar" (R. 36). Notwithstanding this privilege, Petitioner appealed immediately to the United States Court of Appeals for the Fifth Circuit (R. 36) which Court affirmed the order of the District Court Judges (R. 37-42) and denied a subsequent motion for rehearing (R. 47).

Summary of Argument

Admission to the practice of law is a privilege and not a right. Each court is empowered to set reasonable standards of professional competence and high moral character as requisites for admission to its rolls. Each person who seeks for himself the grant of such privilege has the obligation of satisfying the court that he has the necessary qualifications. When a candidate fails to satisfy this burden of proof, he is not entitled to the privilege of Bar membership. Rejection of an application invades none of the applicant's constitutional rights, unless the decision was clearly unreasonable or arbitrary.

Since the petitioner in the matter now under consideration failed to satisfy the members of the Committee on Admissions and the District Judges that his personal character met the prescribed standards, an examination of the complete record will show that the order resulted from Petitioner's failure to discharge the burden of proof rather than from error or arbitrary action on the part of the District Judges.

In addition, the question presented is moot and the proceeding does not present a justiciable controversy from which an appeal may be taken.

Argument

I.

Admission to the Bar of the United States District Court is not a right but a privilege to be granted only to those who satisfy reasonable standards of professional competence and high moral character, in accordance with regulations prescribed by the United States District Court.

The United States District Court for the Southern District of Texas in 1940 revised its Local Rule 5 governing the admission of new attorneys so that its membership would be maintained on a consistently high calibre. Thenceforth, an applicant was required to submit documentary evidence of his professional training and competence. In addition, a Committee on Admissions was established to investigate the fitness, competency and qualifications of each applicant. An attorney who obtained a favorable recommendation from the Bar Committee by showing that his "private and professional character" was "unexceptional" would be admitted to practice in the United States District Court. The provisions of Local Rule 5, which are set forth in Appendix A and on R. 34-35, were adopted pursuant to the statutory authority granted to the Judges of the District Court under Title 28, U. S. Code, Section 2071, which is also set forth in Appendix A.

Petitioner has not raised any question concerning the propriety or reasonableness of Local Rule 5. He complains only of its application in his case.

The right to practice law is not an absolute right nor a natural right, but it is a privilege conferred by law on one

who complies with prescribed conditions. It is obvious that fidelity to the government under which one lives and good character are essential attributes for admission to the bar. Members of the legal profession, at least in this country, are still leaders of legislation and moulders of justice, persons who should not lose sight of the values of the intellect and spirit. These principles are aptly stated in *Re Keenan*, 314 Mass. 544, 50 N.E. 2d 785 at 786:

> "The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a pecu*l*ar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character. All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and to separate the fit from the unfit. Only those who pass the test are allowed to enter the profession, and only those who maintain the standards are allowed to remain in it. To those who acquire and who retain the necessary qualifications is granted a monopoly of the honors and emoluments of a profession which more than any other is public in its nature and intimately connected with the highest functions of the State. Such a monopoly in a quasi public occupation is in no sense promoted and fostered for the personal advantage of individuals. It can be justified only on the ground that long experience has shown it to be absolutely essential to the public welfare. All this is familiar enough. It is adverted to here only for the purpose of emphasizing at the outset that in deciding a case of this kind considerations of public welfare are wholly dominant. The question is not whether the respondent has been 'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare. Where

> any clash of interest occurs, whatever is good for the individual must give way to whatever tends to the security and advancement of public justice."

In the case of *In Re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777, the Court discussed the rules of admission in Connecticut and set forth the historical background of the rules dealing with admission to practice law. See also Justice Cardozo's comments in *People ex rel Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487.

It has long been recognized that the adminitsration of justice is best served by the Courts carefully considering each application and denying those where for any proper reason the applicant should not be admitted to practice law. As said in *Booth v. Fletcher*, 101 F. 2d 677, 680-681 (C.A., D.C.):

> "The lawyer is an officer of the court of whose bar he is a member. It is his privilege and his duty to promote the administration of justice. The profession of the law is one charged in the highest measure with the public interest. Chief Justice Charles E. Hughes has characterized the service of the profession as ' * * * the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed, and the very basis of civilization is made secure.' The theory of appellee's alleged cause of action was that a right of private property had been improperly interfered with. But a lawyer may properly be dispossessed of that right if he uses it in a manner inimical to the public interest. It is a right which is minor and collateral, indeed, compared to the public significance of the status and functions of the lawyer. The people have entrusted to the courts power to regulate standards of education and admission to the bar and power

> to regulate the conduct of members of the bar by orders of discipline and disbarment. *If those not properly trained or those who are morally disqualified are permitted to practice before the courts,* the administration of justice will suffer. 'It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean'." *Hatfield v. King,* 184 U.S. 162, 168.

The Court below said with reference to Petitioner (R. 40):

> "He concedes that he has no constitutional right to practice law, that that is a matter of privilege. This principle of law is so well established that it does not require discussion. See 7 C.J.S., p. 708."

Petitioner does not challenge this statement.

II.

Petitioner had the burden of proving that he possessed the requisite qualifications, and on the basis of the evidence and the hearing before the Court, the order of the judges denying petitioner admission to the Federal Bar was not a violation of due process of law.

Having been admitted to practice law in Texas, the Petitioner became eligible for membership in the Bar of the United States District Court for the Southern District of Texas if he could prove that he possessed the requisite qualifications. He prepared a brief affidavit as to his age, residence and eligibility (R. 3), and provided two recommendations of local attorneys (R. 4). When Petitioner appeared before the Chairman of the Admissions Committee and was questioned as to his relationship with his employer, Morris

Bogdanow, and particularly with regard to his familiarity with his employer's general reputation of being a communist, Petitioner was evasive. At best, he evidenced an indifference as to whether he was employed by a communist.

The full Committee considered Petitioner's application and subsequently reported that he "has not satisfied the Committee that he is entitled to admission" (R. 5). The reasons assigned by the Committee were:

> "He is associated with Morris Bogdanow, who is generally considered to be a member of the Communist Part-. At least, he is referred to as a communist openingly and in publications.
>
> "In previous cases, we have had valuable as-istance from the F.B.I. in getting some idea about whether applicants are communists. In the case of Mr. Bogdanow, assistance was declined. Expressing purely an opinion, we are inclined to believe that there was no lack of willingness to cooperate, but rather that the information is such as the Agent-In-Charge did not care to reveal it.
>
> "The applicant denied being a communist. Asked whether his employer, Mr. Bogdanow, was a communist, the applicant replied: 'I don't know.'
>
> "The Applicant was born and reared in New York and came to Houston only a few years ago.
>
> "We are not sure we can believe his statement that he does not know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers.
>
> "We have not been favorably impressed with this applicant, although our acquaintance is confined to a hearing given to him." (R. 5-6).

Thereafter, Petitioner filed exceptions to the Bar Committee's report (R. 7-9). These exceptions (1) challenged the sufficiency of the hearing granted Petitioner by the Committee, (2) asserted that the report was based on hearsay testimony and hence does not accord with the traditional concept of due process as expressed in the Fifth and Fourteenth Amendments to the United States Constitution, and (3) charged that the Committee procedure was highly arbitrary and capricious, and its recommendation motivated by prejudice and reached by reliance on inadmissible evidence.

It was on his exceptions to the Bar Committee's recommendation that the District Court accorded Petitioner a hearing. At the beginning of this hearing Petitioner was afforded a choice of having his application referred back to the Committee so that he could offer additional proof or of standing on his exceptions. Judge Kennerly said (R. 9-10):

> "The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953, from that Committee.
>
> "I am informed, Mr. Levy, that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.
>
> "As I understood the rules, Mr. Levy had two courses open to him. One was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to the report, and we are here to hear you now, Mr. Levy, on your exceptions. Do you still want to pursue that course?"

"Mr. Levy: Yes, Your Honor.

"Judge Kennerly: All right, you may proceed."

During the argument on the exceptions, Petitioner attempted to convert the proceeding into one for the reception of additional evidence, at which time Judge Kennerly again reminded him of the true nature of the proceeding (R. 19):

> (Mr. Levy): "Your Honors, I am hereby waiving all immunities in requesting that I be placed under oath to answer any relevant questions that deal with my political views or my past or present record.
>
> "Judge Kennerly: I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.
>
> "Mr. Levy: Yes, Your Honor.
>
> "Judge Kennerly: But we, of course, are glad to have your statement and your views about these matters."

Petitioner had previously announced his creed and volunteered a lengthy statement of political views (R. 10-19). He then invited questions from the Bench and in so doing admitted the relevancy of the inquiry (R. 26). The fact that he gave the Court an insight into his ideas cannot now be used by Petitioner to support his contention that he was improperly denied admission to the Bar, and there is absolutely no showing that the Court's order was grounded on an objection to his speech or thought. On the contrary, the full right of free speech was granted applicant by the patient Judges. He read from notes and talked on a wide

range of subjects (R. 10-33) until he acknowledged that he was finished (R. 33).

The right of the Bar Committee and the Court to make pertinent inquiries without invading constitutional rights is shown by the following language from *In Re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, 832.

> "Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech. This has been the principle applied in the field of public employment to sustain a finding that such employees agree to suspend their constitutional rights of free speech by the implied terms of their employment. * * * In seeking the privilege of admission before this court, petitioner must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry."

Following the hearing on the exceptions the Court recessed and thereafter issued its order approving the Bar Committee's recommendation (R. 34). In this connection the Court noted that all applicants carried "the burden of showing that their private and personal characters are unexceptional" (R. 36). It is apparent that the three Judges agreed with the Bar Committee that the Petitioner had failed to satisfy the burden of proof. This was also recognized by the Court below. (R. 40).

Although excepting to the adequacy of the hearing afforded him, and to the evidence upon which the Committee based its recommendation, Petitioner studiously avoided a course which would have resulted in a more thorough investigation being made of him and of his association with Morris Bogdanow, and which would have afforded him an opportunity to present any evidence he considered pertinent.

When the Bar Committee reported (R. 5):

> "We are not sure we can believe his statement that he does not now know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers,"

it was in effect a demand for further information from Petitioner.

In a similar fact situation and concerning this very point, the Supreme Court of Illinois stated:

> " * * * If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. * * * " *(In Re Anastaplo,* 3 Ill. 2d 471, 121 N.E. 2d 826, 831).

Petitioner now states in his brief on page 9 that:

> "The grave accusation made by the Bar Committee is obviously based on no concrete fact, but only on public gossip and irresponsible hearsay."

Had the recommendation of the Committee been unwarranted, Petitioner was afforded every opportunity to establish that fact by the introduction of any evidence which he cared to produce. Had the reputation which the Committee accorded Mr. Bogdanow been unjustified, this could have been established readily. In the face of such findings it is indeed surprising that Petitioner did not accept gladly the opportunity to disprove them, if they were not true. His failure to follow this course and present further evidence to the Bar Committee creates a strong presumption that any additional light shed on the issues would be to Petitioner's disadvantage.

The case of *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, is clearly in point. In that case, H. Ely Goldsmith filed a petition in the Supreme Court of the District of Columbia asking for a writ of mandamus against the United States Board of Tax Appeals seeking (1) to compel the Board to enroll him as an attorney with right to practice before the Board and (2) to enjoin the Board from interfering with his appearance before the Board in behalf of taxpayers. The applicant had filed his application for admission and was advised that the question of his admission to practice had been referred to a committee for investigation. Later he received notice that his application had been received, considered and denied. The applicant made no further application to the Board to be heard. Upon filing of his petition, a Judge of the Supreme Court of the

District ordered a rule against the Board to show cause; the members of the Board answered the rule and set forth their reasons for denial of the application. The petitioner then replied, among other things, that there was no competent evidence on the issue presented, merely hearsay. The Supreme Court dismissed the petition for mandamus and the Court of Appeals of the District affirmed the judgment and when the controversy was presented to the United States Supreme Court, Mr. Chief Justice Taft delivered the opinion of the court and made the following relevant statement (p. 123):

> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. *But he made no demand of this kind.* Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it, he could not appeal to the courts for any remedy, and certainly not for mandamus to compel enrollment." (Emphasis added).

The Bar Committee was not guilty of an abuse of discretion in withholding its approval, for Petitioner had the burden of proving to the satisfaction of the Committee and the Court that he was entitled to membership in the Federal Bar. One may ask what Local Rule 5(a) required when it specified that an applicant's "private and personal character shall be unexceptional". Language used by the Court in *Re Farmer*, 191 N.C. 235, 131 S.E. 661, is pertinent. There

a North Carolina statute set up a similar standard when it provided that "all applicants who satisfy the court of their competent knowledge of the law and upright character may receive a license to practice law in all the courts of the State." The Court stated at 131 S.E. 663:

> "This 'upright character,' prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina, and of which he must, in addition to other requisites, satisfy the court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should, or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong. 'Character,' said Mr. Erskine in the trial of Thomas Hardy for high treason, 'is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion.' Even more is this true when the restoration of character, as here, is the subject of consideration. It is then a matter of time and growth."

Local Rule 5 requires that an applicant must show more than the absence of bad character. There rests an affirmative burden upon him of showing the acquisition of a good name. As stated in *Rosencranz v. Tidrington*, 193 Ind. 472, 141 N.E. 58, 59:

"One of the necessary qualifications to entitle a person to admission to the bar is that he be of good moral character * * *. By asking such admission appellee put his own good moral character directly in issue and assumed the burden of proof as to that issue."

To the same effect, see *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90, 97.

In *Spears v. State Bar of California,* 211 Cal. 183, 294 Pac. 697, the California Supreme Court said:

"It should be noted that the burden of establishing good moral character rests upon the applicant" (p. 698)

"In Re Wells, 174 Cal. 467, 163 P. 657, 660, this court said, Mr. Justice Shaw writing the opinion: 'It is contended on behalf of the applicant that upon an attorney's application for admission the court cannot reject him for want of good moral character, unless it appears that he had been guilty of acts which would be cause for his disbarment or suspension. We think this proposition cannot be sustained. On his admission on certificate he must produce "satisfactory evidence of good moral character." *The burden is on him to do this.* In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. *It is broader in its scope than that in a disbarment proceeding.* The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon

proofs that might not establish his guilt of any of the acts declared to be causes for disbarment.'" (p. 699) (Italics provided by court)

* * *

"As stated in Re Wells, supra, the burden of establishing his good moral character is upon an applicant for admission. Although the committee of bar examiners will make as thorough an investigation as possible, they are not required to undertake the burden of disproving an applicant's allegations of good moral character. And if the proof offered by an applicant falls short of convincing the committee of bar examiners, it is their privilege and their duty to refuse to recommend such applicant for admission to the bar of this state." (p. 700)

* * *

"While the powers of the committee of bar examiners are merely recommendatory, and not binding upon this court, nevertheless, the committee of bar examiners was expressly created by statutory enactment for the definite purpose of relieving the court of the onerous duty of examining applicants for admission and investigating their fitness both as to legal learning and moral character to practice law in this state, and this court, recognizing this fact, will refuse to exercise its power in contravention to the adverse recommendation of the committee of bar examiners unless a convincing showing is made by the applicant to the court that such adverse recommendation is not based upon sound premises and valid reasoning." (p. 700)

Petitioner contends on page 27 of his brief:

"A. The hearing before the Bar Committee appointed to pass upon such applicants for admission to practice before the United States Court was wholly inadequate;".

If we concede, for purposes of argument only, that the hearing was inadequate as Petitioner contends, then should not Petitioner have accepted the offer of Judge Kennerly to re-submit the matter to the Committee (R. 9)? Having failed to avail himself of this opportunity, Petitioner should not be permitted now to contend that the hearing was "wholly inadequate".

Petitioner further contends on page 27 of his brief:

> "B. The Courts below, particularly the hearing in the District Court, failed to supplement or to remedy what had happened (or had not happened) before the Bar Committee;".

Petitioner proceeds on the assumption that the burden was on the Court to prove that he did not have the necessary qualifications. Just the reverse was true; the burden was on Petitioner to prove that he possessed such qualifications. The hearing before the Judges was not an adversary proceeding and Petitioner was duly apprised of its nature (R. 10-19). Petitioner cannot now complain that he was unable to present relevant evidence, when he deliberately avoided a re-submission of the matter to the Bar Committee. Any inadequacy in presentation is Petitioner's fault and not that of the Committee or the Judges. Petitioner must abide his own choice, and if in choosing the wrong procedural course he failed to sustain the proper burden of proof, he cannot assert that others have deprived him of constitutional rights.

The right to practice law is a privilege. One who would avail himself thereof must prove himself worthy of exercising the privilege. As Mr. Justice Cardozo stated in *Re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (Ann. Cas. 1917D, 569); Matter of Durant, 80 Conn. 140, 147, 67 A. 497, 10 Ann. Cas. 539. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment. * * * "

In *Re Frank*, 293 Ill. 263, 127 N.E. 640, an applicant for admission to the Bar was turned down by the Committee on character and fitness. He then made a motion for leave to file an application for a license to practice law. The Court stated at page 640:

"The petition presented with the motion shows that the petitioner has complied with all the requirements of the rule, except as to the production of this certificate, which the committee on character and fitness has refused to issue. The petition avers that the petitioner is a man of good moral character and reputation, and shows that in compliance with a notice from the committee on character and fitness he appeared before that committee, and also presented affidavits and letters pertaining to his character and fitness, but that the committee had refused to grant him the certificate required by the rule, for the reason that the evidence submitted fails to establish affirmatively to the satisfaction of the committee that the petitioner possesses

such character and general fitness as would qualify him for admission to the bar and the performance of the duties of an attorney and counselor at law. The petitioner offers to submit to any examination the court may direct and prays that he may be granted a license, or that a rule be entered on the committee on character and fitness to answer the petition.

"The court will not ordinarily review the decision of the committee on character and fitness against granting a certificate. If such review may be had in any case, it will be only where there has been an arbitrary refusal to hear and consider evidence which may be presented, or a willful refusal of a certificate manifestly not based upon an investigation and consideration of the applicant's qualifications. No such showing is made by this petition. It appears only that the committee, after an examination of the petitioner and of such evidence as was produced, was not satisfied that he possessed such character and general fitness as in the opinion of the committee justified his admission to practice. The granting of the certificate is committed to the judgment and discretion of the committee after a personal examination of each applicant and an investigation of his previous history and such evidence as may be produced. Unless a manifest abuse of this discretion is clearly shown, its judgment will be accepted as final, and no-re-examination of its decision will be undertaken. The judgment of the committee will not be overruled for a mere difference of opinion as to the qualifications and general fitness of the applicant.

"The motion will be denied."

The denial of Petitioner's application under all of the circumstances was not a violation of due process of law. Nothing in the record substantiates Petitioner's conclusions that either the Committee or the Judges were hostile to him,

or that their respective decisions were motivated by personal opinions differing from his own. Petitioner simply failed to prove to the satisfaction of the Committee and the Judges that he had the requisite qualifications.

III.

The action of the Committee on Admissions and that of the District Judges did not violate any rights guaranteed Petitioner by the First Amendment of the Constitution.

At the outset of our consideration of this point, we wish to record our objection to the language contained on page 18 of Petitioner's brief which suggests that racial and religious bigotry were the bases of the Committee's recommendation and the Court's order. The so-called "Unspoken Charge":

> "Was the Petitioner rejected because he was a New York Jew?"

is to be deprecated as an unwarranted challenge of the integrity of the District Court Judges and the members of the Committee on Admissions. It is without substantiation in the record for Petitioner on the very same page admits:

> "A second point not mentioned anywhere is that the Petitioner is a Jew."

There is nothing in the record to support the present contention of Petitioner that he was deprived of admission because of his religious beliefs. It is true that there was a discussion of church membership and spiritual attitudes in which Petitioner willingly participated (R. 20), but it does not follow because such inquiry was undertaken and Peti-

tioner's application subsequently declined that the Court's refusal was a discrimination because of religious beliefs.

After Petitioner announced his creed and provided a lengthy expostulation of political views he invited the Judges to examine his attitudes and, in so doing, he admitted the relevancy of the inquiries (R. 26). Under the circumstances, this was not an invasion of his Constitutional rights to free speech. *In Re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, 832.

Petitioner has been the aggressor; he has raised the cries of racial, religious, sectional and philosophical intolerance after making pointed efforts to draw to the attention of one and all how he differs in each category from the majority. Now, by virtue of these very differences and not through compliance with the Local Court Rules, Petitioner demands entry into the District Court Bar. On such basis alone it cannot be granted. He was provided with timely advice of the courses available to him and of the fact that evidence was only to be taken by the Committee, but he chose to stand on the sufficiency of the credentials that he provided. He has failed to show that the Committee's unfavorable recommendation was unjustified or that his rights to freedom of speech, belief and religion have been infringed.

IV.

The issue is moot.

The order of the District Judges was entered on November 24, 1953 and stated:

"However, Applicant shall have the right at any time after one year from this date to again apply for admission to this Bar." (R. 36).

Inasmuch as the Petitioner was denied membership in the Bar for only the suggested period which has now passed, he is free to re-apply for membership.

> "The District Judges in this instance did not permanently close the doors of the court to the admission of Appellant, but expressly reserved to him the right within twelve months thereafter, to renew his application. The record evidences the apparent purpose upon the part of the District Judges to deal fairly with the applicant. All presumptions of regularity must be entertained by this Court concerning the report of the Bar Committee and the order of the Judges. Applicant was expressly offered the privilege of making a record upon which he could appeal, but declined to do so." (R. 41).

Therefore, the question is moot and the cause should be dismissed.

V.

The order was non-appealable and the cause should be dismissed.

Brooks v. Laws, 208 F. 2d 18, (U.S.C.A. D.C.).

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

LEROY DENMAN MOODY
TOM MARTIN DAVIS
FRANK J. KNAPP
Counsel for Amicus Curiae

Proof of Service

I, C. A. Woodard, a clerk in the office of Messrs. Leroy Denman Moody and Tom Martin Davis, attorneys of record for Houston Bar Association, Amicus Curiae herein, depose and say that on the 9th day of March 1955, I served a copy of this Brief on Bernard A. Golding, Esq., counsel of record for Petitioner Ben G. Levy, by delivering the same to the receptionist in his office at 432 Niels Esperson Building, Houston 2, Texas.

C. A. Woodard

Subscribed and sworn to, before me, at Houston, Texas, this 9th day of March, 1955.

Irene Outwin

Irene Outwin,
Notary Public in and for
the County of Harris,
State of Texas.

APPENDIX A

CONSTITUTIONAL AMENDMENTS
STATUTE AND COURT RULE INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment,
United States Constitution.

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Fifth Amendment,
United States Constitution.

Title 28, U. S. Code Annotated
"Section 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Section 102, 63 Stat. 104."

Local Rules of the United States District Court for the Southern District of Texas, Rule 5: Admission of Attorneys.

"(a) Any attorney who resides in the State of Texas and who has been heretofore or may be hereafter licensed by the District or Superior Courts of the State of Texas, and is

a member in good standing of the Texas State Bar, whose private and personal character shall be unexceptional, and who is competent to practice in this Court, may be admitted to the Bar of this Court in the manner hereinafter set forth."

* * *

"(b) Each applicant for admission shall file with the Clerk his Original and Duplicate Application, setting forth:

(1) His personal statement under oath giving the date and place of his birth, the names of his parents, his place of residence and office address, the courts to which he has been admitted, the places where he has been a practioner, and, if he is not a native born citizen, the date and place of his naturalization, and information respecting any action of any court that would have a bearing on his conduct, competency, or fitness as a member of the bar; and

(2) Attach to the Original Application as Exhibits two letters or signed statements (which need not be in duplicate) of members of the bar of this Court, not related to the applicant, who are resident practioners within this District, stating that the applicant is personally known to them, that he is competent to practice in this Court, and possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his private and professional character and standing are good; and

(3) Also attach certificate or other documentary evidence (which need not be in duplicate), showing that he has been licensed as provided in Subparagraph (a) hereof.

"(c) For the purpose of examining into and reporting on the fitness, competency, and qualifications of all appli-

cants for admission to the Bar of this Court, there is hereby created for each Division of the Court where the Court shall deem necessary a committe of three members of the Bar of this Court, to be appointed by the Judges of this Court as a standing committee for such purpose. One member of such Committee shall be designated Chairman. When any application is filed with the Clerk, he shall, after making a record of same in a book to be kept for that purpose, immediately refer the same to the committee in charge, transmitting to the Chairman thereof the Original Application and attached Exhibits. Such Committee, as soon as such application is referred to it, shall, in such manner as it may deem proper, at once make an investigation of the fitness, competency, and qualifications of the appellant, and for such purposes the committee shall have the power given a Master of this Court under Rule of Federal Procedure 53 to summon witnesses, administer oaths, and take testimony by deposition or otherwise, when in its opinion it is desirable to do so, and shall file a report in writing, showing the result of such investigation, within thirty days thereafter, unless the Court may extend such time for a longer period and shall with its report return to the Clerk such Original Application, Exhibits, and other papers.

"(d) After the petition has been filed for thirty days, and has been referred to the Committee above provided for, and the Committee has filed its report thereon, the applicant may, either with or without further hearing before the Court, by order of the Court, be admitted or denied admission to the Bar of this Court. When so admitted, the applicant shall pay the fees provided by law, subscribe the roll in the office of the Clerk, and upon the motion of a member of the Bar of this Court in open Court take either the oath or affirmation of the following tenor:

'I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court according to the best of my ability and learning, and with all good fidelity as well to the Court as to the client. That I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the Constitution of the United States. So help me God.' "

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

IN RE: BEN G. LEVY

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S MOTION IN OPPOSITION TO FILING OF AMICUS CURIAE BRIEF OF HOUSTON BAR ASSOCIATION

Petitioner's Counsel invariably consents to filing Amicus Curiae Brief, as witness, *Carpenters and Joiners Union of America, Local No. 213, Et Al., v. Ritter's Cafe,* 315 U.S. 722, and other cases, whenever and wherever the record establishes that the one so filing has standing in this Court,

and the Brief constitutes an instrument of unquestioned aid to this Court.

AMERICAN CIVIL LIBERTIES UNION, AND OTHER ORGANIZATIONS, HAVE EARNESTLY REQUESTED PETITIONER TO GIVE CONSENT TO THE FILING OF AMICUS CURIAE BRIEF IN THIS CAUSE. ALL OF THESE REQUESTS, APPARENTLY MADE IN GOOD FAITH, HAVE BEEN DENIED BECAUSE IT WAS FELT THAT SAME WOULD NOT ADD TO THE EDIFICATION OF THIS COURT ON SUCH GRAVE ISSUES, AND THAT PETITIONER DID NOT REQUIRE A RESCUE SQUAD.

PETITIONER SEES NO REASON FOR DEVIATING FROM THIS COURSE IN TREATING THE REQUEST OF HOUSTON BAR ASSOCIATION POSSESSING **NO STANDING IN THIS COURT.**

The Record in *this* case does not show that the authors of the Amicus Curiae Brief, submitted to this Court on March 11; 1955, (two of whom are members of the same law firm as James L. Shepherd, Jr., Esq., who is, and has been for several months, Chairman of the Committee on Admissions in the United States District Court) have any authority to file such Amicus Curiae Brief for the Association.

James L. Shepherd, Jr., Esq., Chairman of this Committee, refuses to file a brief in this matter although served with Petitioner's Brief as manifest of record.

Since Houston Bar Association has *no* standing in this Court, allowance to file such Brief runs counter to the spirit, intent, and purpose of Amicus Curiae Brief.

The Committee on Admissions in the Federal Courts, this area, *appointed by the United States Judges of the Southern District of Texas,* is the *only* agency legally entitled to file a Brief in this Court. It is this Committee which recommended against Petitioner's admission. The judgment of the courts below simply affirmed the action of such Committee. The Houston Bar Association has *never* been a part of this litigation.

* * *

The Amicus Curiae Brief sought to be filed would seem to indicate that its authors have strayed from realities.

It is not believed that they seriously contend that this cause is "moot" inasmuch as the subject matter of this cause is Petitioner's admission to the Bar, and, as such, is patently available for the judgment of this (Supreme) Court to operate on. Quite clearly, Petitioner's right or privilege to renew his application does *not* obviate the question, inasmuch as the United States District Court is presumably free *to renew its refusal to admit.*

This cause cannot properly be considered "moot" until Petitioner is granted admission to practice in the Federal Courts, or, in the alternative, the issues are finally adjudicated by this Court.

In no sense has the vitality of the judgment in this case been dissipated since the controversy confronting the court has *not* ended.

The importance of the Constitutional issues, not the parties, caused entry of this cause into this Court. These important issues did not perish when Petitioner appealed from an adverse judgment. Nor were these grave issues dis-

solved by the cavalier statement that Petitioner might or could re-apply a year later.

The stigma and ugly implications attached to Petitioner by virtue of his exclusion from practice in the United States Courts and the related grave consequences are not dissipated because it is said that he may apply again, without any assurance that the same result will not prevail against him.

Whether this matter is "moot" is quite definitely answered in such cases as *Fiswick v. U. S.*, 329 U.S. 211; *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37; and *Culver v. City of Warren* (Ohio App.), 83 N.E. 2d 82, 90, 91.

No one carefully eschewing whimsical or irrational considerations in evaluating the claims pressed by Petitioner could conscientiously assert this cause to be "moot".

> "Reliance on the good faith of * * * " an agency "entrusted with the enforcement of appropriate standards for the practice of * * * " law "is not in itself an investiture of arbitrary power offensive to due process." *Barsky v. Board of Regents of University*, 347 U.S. 442, 470.

Likewise, it does not seem inappropriate to state that

> "A license cannot be" denied "because a man is redheaded or because he was divorced, except for a calling, if such there be, for which redheadedness or an unbroken marriage may have some rational bearing." *Barsky v. Board of Regents of University*, 347 U.S. 442, 470.

It is respectfully submitted that the Motion to File the

Amicus Curiae Brief of Houston Bar Association should be, in all things, denied and rejected.

Respectfully submitted,

BERNARD A. GOLDING,
432 Niels Esperson Bldg.,
Houston 2, Texas,
Counsel for Petitioner
(On Appeal Only)

No. 394. In re Levy. Certiorari, 348 U. S. 887, to the United States Court of Appeals for the Fifth Circuit. Argued March 31, 1955. Decided April 4, 1955. *Per Curiam:* The record in this case discloses no sufficient grounds for the failure and refusal of the District Court to grant petitioner's application for admission to the bar of that Court. The judgment of the Court of Appeals is accordingly reversed with direction to remand the cause to the District Court for appropriate action in accordance with this order. *Bernard A. Golding* argued the cause for petitioner. *Leroy Denman Moody* filed a brief for the Houston Bar Association, as *amicus curiae*, urging affirmance. Reported below: 214 F. 2d 331.